SUPREME COURT, U. S.

MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1067

SEABOARD AIR LINE RAILROAD COMPANY, *Petitioner,*

v.

WARREN G. WILLIAMS, JR., *Respondent.*

On Petition for Writ of Certiorari to the Supreme Court of Florida

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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INDEX

	Page
PRELIMINARY	1
OPINIONS	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATUTE INVOLVED	4
STATE OF THE CASE	4
REASONS RELIED ON FOR ALLOWANCE OF THE WRIT	6
CONCLUSION	15

APPENDIX A—1973 Opinion of the Supreme Court of Florida	1a
APPENDIX B—1972 Opinion of the District Court of Appeal	6a
APPENDIX C—1967 Opinion of Supreme Court of Florida	16a
APPENDIX D—1966 Opinion of District Court of Appeal	20a
APPENDIX E—Statute Involved	20a
APPENDIX F—Opinion of Supreme Court of Florida in *Hoffman* v. *Jones*, 280 So. 2d 431 (Fla. July 10, 1973)	21a
APPENDIX G—Petition for Re-hearing and Supplemental Petition for Re-hearing in the Supreme Court of Florida	41a

CASES: Page

Broad River Power Company v. *State of South Carolina*, 50 S.Ct. 401, 281 U.S. 537, 74 L.Ed. 1023 10
Demorest v. *City Bank Farmers Trust Co.*, 64 S.Ct. 384, 321 U.S. 36, 88 L.Ed. 526 10
Georgia, Southern and Florida Railway Company v. *Seven-Up Bottling Company of Southeast Georgia, Inc.*, 175 So. 2d 39 (Fla. May 12, 1965) 4, 5, 7, 9
Gibbs v. *Zimmerman*, 290 U.S. 326, 78 L.Ed. 342, 54 S. Ct. 140 10
Hancock v. *Board of Public Instruction of Charlotte County*, 158 So. 2d 519 (Fla. 1963) 11
Hoffman v. *Jones*, 280 So. 2d 431 (Fla. July 10, 1973) 5, 11, 12, 13
Holland v. *Webster*, 29 So. 625 (Fla. 1901) 8
Holley v. *Adams*, 238 So. 2d 401 (Fla. 1970) 11
Jones v. *Hoffman*, 272 So. 2d 529 (4 D.C.A. Feb. 8, 1973) 5
Marshall and Spencer, et al v. *The Peoples Bank of Jacksonville*, 101 So. 358 (Fla. 1924) 8
Memphis v. *United States*, 97 U.S. 293 13
Oyama v. *State of California*, 68 S.Ct. 269, 332 U.S. 633, 92 L.Ed. 249 14
Seaboard Airline Railroad Company v. *Warren G. Williams, Jr.*, 199 So. 2d 469 (Fla. 1967) 8
State v. *Barquet*, 262 So. 2d 431 (Fla. 1972) 11

SECONDARY AUTHORITIES:

Stern and Gressman, Supreme Court Practice, 136-7 .. 13

STATUTES:

Florida Statutes, Section 768.06 4
28 U.S.C., Section 1257 (3) 2

CONSTITUTIONAL PROVISIONS:

Section 1, Fourteenth Amendment, Constitution of the United States 3
Section 12, Declaration of Rights, Constitution of the State of Florida 3

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a Writ of Certiorari issue to review the decision of the Supreme Court of the State of Florida entered in this case on July 31, 1973.

PRELIMINARY

Petitioner, SEABOARD AIR LINE RAILROAD COMPANY, which was the Defendant in the Trial Court will be herein referred to as "Seaboard".

Respondent, WARREN G. WILLIAMS, JR., who was the Plaintiff in the Trial Court will be herein referred to as "Williams".

The District Court of Appeal of Florida (the intermediate appellate Court), will be herein referred to as "the District Court".

The Supreme Court of Florida will be herein referred to as "the Supreme Court".

The Record will be herein referred to as "R". The Supplemental Record will be herein referred to as "SR".

CITATION TO OPINION BELOW

The opinion of the Supreme Court is reported at 283 So. 2d 33 and it is printed herein as Appendix A. Companion cases are Williams v. Seaboard Air Line Railroad Company, 268 So. 2d 462 (4 D.C.A. 1972), printed herein as Appendix B, and Seaboard Air Line Railroad Company v. Williams, 199 So. 2d 469 (Fla. 1967). printed herein as Appendix C.

JURISDICTION

The decision of the Supreme Court was entered on July 31, 1973. A timely Petition for Re-hearing was denied on October 10, 1973 (SR). The jurisdiction of the Court is invoked under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

I.

Whether it is a violation of Seaboard's right of due process and equal protection of the law as guaranteed by the Constitution of the United States for the Supreme Court to reinstate a judgment against Seaboard that it had previously reversed because it was based on a State Statute that it had declared to be unconstitutional.

II.

Whether it is a violation of Seaboard's right to due process and equal protection of the law as guaranteed by the United States Constitution for the Supreme Court to give retroactive application to a recent decision revitalizing a State law which it had previously held to be invalid and which was not in effect at the time the case was tried, appeal completed and petition for certiorari filed.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT XIV, CONSTITUTION OF THE UNITED STATES:

> SECTION 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

SECTION 12, DECLARATION OF RIGHTS, FLORIDA CONSTITUTION:

> "No person shall be subject to be twice put in jeopardy for the same offense, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken without just compensation."

STATUTE INVOLVED

Florida Statute, Section 768.06 (Appendix E)

STATEMENT OF THE CASE

Seaboard was the Defendant in the Lower Court in a suit brought by Williams for injuries received in a crossing accident occurring in West Palm Beach, Florida, on July 29, 1963. The case was tried under the Florida Comparative Negligence Statute (Section 768.06, Florida Statutes), which was applicable only to cases involving railroads. All other cases were subject to the rules of contributory negligence. The jury returned a verdict in favor of Williams (R-1).

On October 26th, 1964, Seaboard filed an Appeal with the District Court of Appeals of Florida, Second District. Subsequently, the case was transferred to the newly created District Court of Appeal, Fourth District. While the case was on appeal, the Supreme Court of Florida, in *Georgia, Southern and Florida Railway Company* v. *Seven-Up Bottling Company of Southeast Georgia, Inc.,* 175 So. 2d 39 (Fla. May 12, 1965), declared the Comparative Negligence Statute of Florida unconstitutional. Despite the change in the law, the District Court entered a per curiam order affirming the decision of the Trial Court (R-3). The Court denied Seaboard's Petition for Rehearing, whereupon Seaboard then petitioned the Supreme Court for a Writ of Certiorari which was granted. After arguments on the merits, the Supreme Court entered a per curiam decision of May 24, 1967, reversing the District Court and remanding the case for a new trial (Appendix C). Subsequent to denial of his Petition for Rehearing, Williams filed a Petition for Writ of Certiorari in this

Court which was also denied. 390 US 920, 88 S.Ct. 851 (1968).

The case was retried in the Circuit Court in and for Palm Beach County in November, 1969 under the applicable doctrine of contributory negligence as established by the Supreme Court on May 12, 1965 in *Seven-Up*. That trial resulted in a judgment for Seaboard dated November 24, 1969 (R-11). Williams took his appeal to the District Court, which affirmed in a per curiam decision (Appendix B). Although oral argument was heard on July 21, 1970, the opinion was not filed until November 2nd, 1972. A dissenting opinion was written by Associate Justice, David L. McCain, who between the time of the oral argument and the rendition of the opinion, had been appointed a Justice of the Supreme Court of Florida.

On November 30, 1972, Williams filed a Petition for a Writ of Certiorari in the Supreme Court. While this petition was pending and prior to order allowing certiorari, entered on February 28, 1973, the District Court decided, on February 8, 1973, the case of *Jones* v. *Hoffman* reported at 272 So. 2d 529, in which the District Court certified a question of great public interest to the Supreme Court. The question certified was "Whether or not the Court should replace the Contributory Negligence Rule with the principles of Comparative Negligence?" On July 10, 1973, the Supreme Court issued its opinion in *Hoffman* v. *Jones,* 280 So. 2d 431 (Fla. 1973), adopting the rule of Comparative Negligence for the State of Florida (Appendix F).

On July 31, 1973, the Supreme Court, in the certiorari proceedings in the case at bar, quashed the decision of the District Court and ordered remand of the

cause to the Circuit Court for reinstatement of the original Final Judgment of July 3rd, 1964 (Appendix E). Pursuant to the Mandate, the original judgment has been reinstated (R-32).

The question of violation of federally guaranteed rights of Seaboard was raised immediately upon realization that the Supreme Court had done violence to them. Their rights were first interferred with by the decision sought to be reviewed here. Seaboard raised the question in its Petition for Rehearing, timely filed after the entry of the opinion on July 31, 1973. The Petition for Rehearing, dated August 13, 1973, is included herein as Appendix G. The Supreme Court denied the petition in its Order of October 10, 1973 (SR). The federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment since it was done at the first instance in this case that the federally guaranteed rights were denied it by the Supreme Court's decision of July 31, 1973.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The decision of the Supreme Court of which review is sought raises an important and grave question for determination by this Court. Can a State Supreme Court, in derogation of constitutionally protected rights, apply a recent change in the law to a case founded on a void statute, thus depriving Seaboard of a judgment in its favor which protects it in its guaranteed property rights? Constitutional requirements demand protection where these federal rights are so infringed by a State Court decree.

If the *stare decisis* requirements of consistency and stability are not enough, then justice and fair treat-

ment demand protection of these constitutionally guaranteed rights. Retrospective application given by the Court denies to Seaboard these rights.

The Supreme Court has violated the doctrine of separation of powers which is the bedrock of both the State and Federal constitutions and under which doctrine there is no power in the judiciary branch to make statutory law. The constitutional protection guaranteed Seaboard and others has been denied as a result of this usurpation of the legislative function.

I.

Whether It Is a Violation of Seaboard's Right of Due Process and Equal Protection of the Law as Guaranteed by the Constitution of the United States for the Supreme Court To Reinstate a Judgment That It Had Previously Reversed Because It Was Based on a State Statute That It Had Declared to be Unconstitutional?

Prior to 1965, Florida had in effect a Comparative Negligence Statute which was applicable only to railroads (Appendix E). On May 12th, 1965, the Supreme Court declared that the Comparative Negligence Statute was unconstitutional in the case of *Georgia Southern and Florida Railway Company* v. *Seven-Up Bottling Company of Southeast Georgia, Inc.,* 175 So. 2d 39. The rationale of that decision was the arbitrary and discriminatory nature of the statute as applicable to one particular class of persons, to-wit—railroads. The statute was held to be invalid under the due process an dequal protection clauses of the Federal Constitution and Section 12, Declaration of Rights of the Florida Constitution. With the abolition of the Comparative Negligence Statute, the rule of contributory negligence became the law of Florida in all negligence cases. On the basis of the *Seven-Up* decision, the Su-

preme Court in *Seaboard Airline Railroad Company* v. *Warren G. Williams, Jr.,* 199 So. 2d 469 (Fla. 1967), (Appendix C), quashed the decision of the District Court, which had affirmed the judgment for Williams and remanded the cause to the trial Court for a new trial to be conducted pursuant to the doctrine of contributory negligence. The result of these two cases, therefore, was the declaration of unconstitutionality of the Comparative Negligence Statute and the establishment of Contributory Negligence as the law of the case at bar.

When the Comparative Negligence Statute was held to be unconstitutional, it immediately became void and was, therefore, nonexistent. Yet, what the Supreme Court has now done is order reinstatement of a judgment that was entered nine years earlier on the basis of that statute. The effect of this erroneous ruling was to revitalize the dead statute, eight years later, and reestablish the judgment grounded thereon more than nine years after its entry. This flies in the face of the Court's own statement in the 1967 reversal of *Williams* (Appendix C) that an erroneous rule of law had been applied at the trial, referring to the comparative negligence rule (R-9). This was corrected by its declaring the Comparative Negligence Statute to be invalid as contrary to constitutional requirements. The decision of the District Court of July 22nd, 1966 was quashed and the case remanded for a new trial. After such quashal and remand the original judgment was void and stood as though no judgment had been rendered at all. *Marshall and Spencer, et al* v. *The Peoples Bank of Jacksonville,* 191 So. 358 (Fla. 1924). The word "quash" means annul or make void. *Holland* v. *Webster,* 29 So. 625 (Fla. 1901)

The perplexing nature of the ruling in question is amplified when the effect of the decisions is realized. In its first appearance before the Florida Supreme Court, in 1967, 199 So. 2d 469, it was held that contributory negligence was the correct rule to be applied but now, in the case at bar, seven years later, it is held that to be an erroneous rule of law and should not be applied. Further, the doctrine of comparative negligence which the Court held to be an erroneous rule in 1967, was not an erroneous rule and should now be the law of this case. The Court's decision is incompatible with a stable and consistent system of justice and makes it difficult, if not impossible, for the bench and bar to rely on such case law.

The Supreme Court has unquestionably gone far beyond the accepted and usual judicial function and its decision, therefore, is improper. As the Supreme Court itself has decided, Williams was not tried on a correct and equitable principle in 1964, since comparative negligence was used and as the Supreme Court said in its opinion, an erroneous rule of law was applied. The Comparative Negligence Statute was held to be void and pursuant to the Court's mandate, as a result of the *Seven-Up* decision, the law of the case, to-wit—contributory negligence, was established by the Court. The Supreme Court can not now go behind its prior decision and re-enter a former judgment which the Court itself declared to be void as based on erroneous and unconstitutional principles. This action of the Supreme Court has not only caused confusion and instability in the system of jurisprudence in Florida, but has been a wrongful denial of the constitutionally guaranteed rights of Seaboard.

What the Court has done is destroy Seaboard's vested right in the judgment in derogation of the preservation of this substantial property right guaranteed by the Fourteenth Amendment. A right of action, and especially one which has been reduced to judgment, is property in the same sense as tangible things are property and is equally protected against arbitrary interference. *Gibbes* v. *Zimmerman,* 290 US 326, 78 L.Ed. 342, 54 S.Ct. 140. At the time the District Court issued its order in its 1972 decision, Seaboard had a vested interest in the judgment. It had acquired a property right which could not be taken from it in a fashion violative of due process. The record on its face contains no error and no conflict with prior or contemporaneous decisions of the Court. (See Appendix A, Page 3) (R-29). It was error for the Supreme Court to accept certiorari jurisdiction and then decide the case on the basis of its opinion in another, subsequent case. There was no fair or substantial basis upon which the Supreme Court could found its decision and thus evade the constitutional obligations guaranteed Seaboard. *Broad River Power Company* v. *State of South Carolina,* 50 S.Ct. 401, 281 US 537, 74 L.Ed. 1023. Also see *Demorest* v. *City Bank Farmers Trust Co.,* 64 S.Ct. 384, 321 U.S. 36, 88 L.Ed. 526.

There is grave question whether the Supreme Court is empowered to reject and replace the doctrine of contributory negligence by judicial fiat as it did in Hoffman v. Jones, 280 So. 2d 431, (Fla. July 10, 1973 (Appendix F)). If this is so, then the Court's decision in this case which was bottomed on its rejection of the longstanding contributory negligence doctrine and replacing it with comparative negligence, could not stand. Under the doctrine of separation of powers, the

judiciary has no power to make statutory law. This doctrine has been religiously guarded by the Florida Courts. *Hancock* v. *Board of Public Instruction of Charlotte County,* 158 So. 2d 519 (Fla. 1963), *Holley* v. *Adams,* 238 So. 2d 401 (Fla. 1970), *State* v. *Barquet,* 262 So. 2d 431 (Fla. 1972).

The re-entry of the 1964 verdict against Seaboard denies to it the constitutional right to due process and equal protection of the law in that the verdict was not rendered according to a proper jury instruction under the rule of comparative negligence established by *Hoffman* v. *Jones,* supra. That form of comparative negligence as opposed to that under which the case at bar was originally tried, requires that the jury be instructed that it must first find the total amount of damages payable as a result of the accident and then reduce it by the percentage of negligence of which Williams was guilty. Such an instruction was not required nor given in the original trial but is required under the current comparative negligence doctrine. See Hoffman v. Jones, Appendix F where the Court said at page 11:

> "If plaintiff and defendant are both at fault, the former may recover, but the amount of his recovery may be only such proportion of the entire damages plaintiff sustained as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant. For example, where it is found that the plaintiff's negligence is at least equal to that of the defendant, the amount awarded to the plaintiff should be reduced by one-half from what it otherwise would have been.

To simply re-enter the original verdict, therefore, denies to Seaboard its right to have the case tried under

the applicable rule of law and subverts its Fourteenth Amendment rights.

The only way that Seaboard can be protected in its constitutional rights is for the case to be re-tried under proper instructions based on the decision of *Hoffman* v. *Jones*.

II.

Whether It Is a Violation of Seaboard's Right To Due Process and Equal Protection of the Law as Guaranteed by the United States Constitution for the Supreme Court of Florida To Give Retrospective Application to a Recent Decision Revitalizing a State Statute Which It Had Previously Held to be Invalid and Which Was Not in Effect at the Time the Case Was Tried, Appeal Completed and Petition for Certiorari Filed?

The Supreme Court in granting respondent's Writ of Certiorari improperly gave retrospective application in the case at bar to the rule stated in *Hoffman* v. *Jones,* 280 So. 2d 431, establishing comparative negligence as the law of Florida. This decision was rendered four years after the determination of Seaboard's case in the Trial Court, after the termination of the appeal in the District Court of Appeal and after the filing of William's Petition for Writ of Certiorari in the Supreme Court. It is readily apparent that the Supreme Court acted unjustly in its retrospective application of the *Hoffman* v. *Jones* decision where the established law of this case had long been in effect and both parties, as well as numerous other litigants in the State of Florida had relied on its application. This is particularly so where the Supreme Court itself had established the law of the case in its 1967 opinion. Examination of the particular circumstances of Seaboard's case is necessary in order to afford it the constitutionally guaran-

teed right to due process and equal protection of the law.

Retrospective legislation is prohibited under the Fourteenth Amendment when it divests any vested interest. *Memphis* v. *United States,* 97 U.S. 293. While the establishment of comparative negligence in the State of Florida was not an act of the Florida legislature, it was unquestionably legislation in the true sense of the word even though by judicial decree. (See Mr. Justice Roberts dissenting opinion in *Hoffman* v. *Jones,* supra.) The vicissitudes of the law in this case vividly illustrate the doubts and uncertainties existent if this decision is allowed to stand.

As stated in *Stern and Gressman, Supreme Court Practice,* 136-7: "Except where an irreconcilable conflict compels review by the Supreme Court, the importance of the issues involved in the case as to which review is sought is of major significance in determining whether the Writ of Certiorari will issue. The Court does not have time to give full consideration to all cases which present novel or interesting issues. It must necessarily confine itself to those which reflect the more important legal problems within the realm of its jurisdiction."

Applying this principle to the case at bar, it clearly appears that the points involved have widespread importance, not only to the bench and bar, but to litigants who have legitimate cases and controversies to be decided by the Courts. It is absolutely necessary that consistency and stability in the interpretation and application of the law exist in order that the law may be relied upon. Where a State Supreme Court arbitrarily re-establishes a judgment entered years ago which that

Court itself had reversed as being founded on a statute which the same Court in another case had declared to be unconstitutional, then that large class of persons who subsequently become litigants may be denied their constitutional rights after reliance on such a Court decision. That class of persons who constitute the bar would be unable to properly advise their clients as to what the law is as relating to their particular problem and the bench would find it difficult to decide what law to apply to a particular set of facts. These problems raise "special and important" reasons for this Court to review the unique background of this case by granting the writ.

Under the particular circumstances of this case, where the litigants relied on the rule established by the Supreme Court itself only to have it unwisely change the law, the retrospective application is repugnant to the Fourteenth Amendment. A review of this series of cases, noting the reliance on the law established by the Court, the change by the Court of the law of the case, the improper revival of a void statute, retrospective application of a recent case and the inordinate and very unusual delay in deciding and reporting the case by the District Court two years and four months after oral argument, all compel the determination that Seaboard was denied its right to due process and equal protection of the laws guaranteed by the Fourteenth Amendment. This Court has the authority, indeed, the duty, to determine not merely whether federal constitutional rights have been denied in express terms, but also whether they have been denied in substance and effect. *Oyama* v. *State of California*, 68 S.Ct. 269, 332 U.S. 633, 92 L.Ed. 249.

Additionally, it would seem that the particular facts of this case present a question of sufficient public importance so as to invoke the discretionary power of this Court to grant certiorari.

CONCLUSION

For all reasons stated herein Petitioner prays that the Petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D., 1973

CASE NO. 43,088

WARREN G. WILLIAMS, JR., *Petitioner,*

v.

SEABOARD AIRLINE RAILROAD CO., etc., *Respondent.*

Opinion filed July 31, 1973

Writ of Certiorari to the District Court of Appeal, Fourth District

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Arthur E. Barrow of Caldwell, Pacetti, Barrow & Salisbury, for Respondent.

BOYD, J.

This cause is before us on petition for writ of certiorari to review the decision of the District Court of Appeal, Fourth District, reported at 268 So.2d 459. Our jurisdiction is based upon conflict between the decision sought to be reviewed and *Johnson* v. *Rinesmith*.[1]

Petitioner, plaintiff below, sustained severe personal injuries as a result of a collision between the van type milk truck he was operating and a Seaboard train. The accident occurred during the early morning hours at a crossing within the city limits of West Palm Beach, Florida. Trial was originally held before a jury, and resulted in a verdict for the plaintiff in the amount of $141,750.00. That verdict was entered on July 3, 1964. Thereafter, the District Court

[1] 238 So.2d 659 (Fla.App.2d 1970).

of Appeal, Fourth District, on July 26, 1966, affirmed the judgment for the plaintiff. The railroad then brought a petition for writ of certiorari to this Court and, in a per curiam decision, this court reversed the District Court and ordered a new trial.[2] The reversal for new trial was based on the fact that this Court had invalidated the railroad comparative negligence statute in *Georgia Southern and Florida Railway Co.* v. *Seven-Up Bottling Co.*[3] This Court remanded the cause for a new trial free of charges under the invalid comparative negligence statute.

Pursuant to this Court's order, the cause was retried before the Court without a jury, and final judgment was entered in favor of defendant railroad. At the retrial, portions of the transcript of the original trial were admitted and, additionally, several witnesses were called to offer their testimony anew. The District Court affirmed the judgment for the defendant, with then Judge McCain dissenting. The opinion of the majority reviewed the evidence in the case, which established the negligence of the railroad in failing to maintain the crossing, in accordance with the city ordinance requiring an automatic electrical signal device or, alternatively, crossing gates maintained with railroad personnel. There was also considerable evidence that the train was speeding at the time of the accident. However, the District Court concluded that even though there was uncontradicted evidence of negligence on the part of the railroad, in failing to comply with the municipal ordinance requiring installation of the automatic electric signal devices, or to provide a manned crossing gate, the trial court, as trier of fact, could have concluded "that the failure to have such signal device at the crossing was not a legal cause of the collision."[4] The District

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[2] *Seaboard Airline Railroad Company* v. *Williams*, 199 So.2d 469 (Fla. 1967), *reh. denied, cert. denied* 390 U.S. 920 (1968).

[3] 175 So.2d 39 (Fla. 1965).

[4] 268 So.2d at 462.

Court stated that there was evidence in the record supporting a finding of contributory negligence on the part of the defendant in driving his vehicle slowly onto the tracks. Plaintiff stated that his reason for driving slowly was that the crossing was bumpy and his van was loaded with milk which would tip over. He also stated, however, that he had no warning of the approach of the train, either visually or by signal.

The District Court refused to consider plaintiff-petitioner's contention that, in any event, contributory negligence should not bar recovery because the railroad's conduct constituted willful and wanton misconduct to which contributory negligence was not a defense. The District Court stated that this issue was not raised in the pleadings or presented to the trial court.

Petitioner contends that the decision of the District Court conflicts with *Johnson* v. *Rinesmith, supra*, a personal injury action, wherein, on rehearing, the District Court of Appeal, Second District, held:

> "When this case was first before us I thought, and persuaded my colleagues to agree, that the adult plaintiffs had not properly preserved the question of willful and wanton misconduct on the defendant's part during the first trial. It was indeed obscured at the time so that even the trial judge was unaware of the plaintiffs' purpose in seeking to prove that Bolt was drunk at the time. Counsel did not, in proffering the testimony, make his purpose plain, and its relevance eluded the trial judge and all of us. As we pointed out, however, it was raised in the pleadings and was admissible not only in proof of simple negligence, which defendant admitted at trial, but of willful and wanton misconduct. My error lay in assuming that plaintiff's counsel, by agreeing prior to trial that the issues to be tried were defendant's negligence, plaintiff's contributory negligence and damages, had eliminated the issue of willful and wanton misconduct. * * * While willful and wanton misconduct of the gravity which would justify conviction of manslaughter if

death were caused by it is closer to intentional harm than to simple negligence, it is nevertheless treated within the general heading of negligence in the treatises, and we are of opinion that the issue was not foreclosed by pretrial proceedings.

"Our Supreme Court has indicated that contributory negligence is not a defense to willful and wanton misconduct."[5]

In the instant case, respondent points out that willful and wanton misconduct was not pleaded, as it was in *Johnson* v. *Rinesmith, supra.* Further, since the trial court, as trier of the fact, apparently found no actionable negligence on the part of the railroad, it presumably also did not find willful and wanton misconduct.

Petitioner also contends that the decision of the District Court, by sanctioning a retrial not only of contributory negligence but of negligence, created conflict with the decision of this Court which remanded for a new trial. Finally, petitioner contends that the District Court "by presuming the trial court found alternatively that the respondent was not negligent and that the petitioner was contributorily negligent, created direct conflict. . . ." with *Green* v. *Atlantic Company,*[6] and *Saunders* v. *Kaplan,*[7] cases holding that the issue of contributory negligence is reached only after a determination has been made that there was no negligence on the part of the defendant.

Although our jurisdiction in this second appearance of the instant case before this Court is based upon conflict between the District Court's latest opinion in the matter and the prior case of *Johnson* v. *Rinesmith, supra,* and despite the rocky road of new allegations, proofs, and legal theories this case has traversed to reach this Court a sec-

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[5] 238 So.2d at 660 (On rehearing granted.)

[6] 61 So.2d 185 (Fla. 1952).

[7] 101 So.2d 181 (Fla.App.3d 1958).

ond time, we find that we may now dispose of the cause in a rather simple manner. On July 10, 1973, this Court issued its opinion in the landmark case of *Hoffman* v. *Jones*, adopting the rule of comparative negligence for the State of Florida. Speaking for the Court, Mr. Justice Adkins established the guidelines for the application of that decision:

> "We hold that this opinion shall be applied as follows:
>
> • • •
>
> "As to those cases in which trial has already begun or in which verdict or judgment has already been rendered, this opinion shall not be applicable, *unless the applicability of the comparative negligence rule was appropriately and properly raised during some stage of the litigation.*
>
> • • • "[9]

In view of the fact that this cause was *originally* tried upon the principles of comparative negligence, albeit under the now defunct railroad comparative negligence statute,[10] it is clear that the principles enunciated in *Hoffman* apply herein because "the applicability of the comparative negligence rule was *appropriately* and *properly* raised during *some* stage of the litigation." Since, as we also held in *Hoffman*, our existing body of case law dealing with comparative negligence, that which arose under the railroad comparative negligence statute, will be generally applicable to our new universal rule of comparative negligence, both justice and common sense mandate that we simply reinstate the original judgment of the trial court in this matter.

Accordingly, the decision of the District Court of Appeal, Fourth District, is quashed and the cause remanded with instructions to further remand the cause to the Circuit

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[8] — So.2d — (Fla.S.Ct. July 10, 1973), Case No. 43,443.

[9] *Id.* at ——. (Emphasis supplied.)

[10] Section 768.06, Florida Statutes, *see note* 3, *supra.*

Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, in order to reinstate its original final judgment of July 3, 1964, awarding petitioner-plaintiff $141,750.00.

It is so ordered.

CARLTON, C.J., ERVIN and ADKINS, JJ., concur
ROBERTS, J., dissents

APPENDIX B

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JULY TERM 1972

CASE No. 69-849

WARREN G. WILLIAMS, JR., *Appellant,*

v.

SEABOARD AIRLINE RAILROAD COMPANY, a foreign corporation authorized to do business in the State of Florida, *Appellee.*

Opinion filed November 2, 1972.

Appeal from the Circuit Court for Palm Beach County; Culver Smith, Judge.

Joseph D. Farish, Jr., of Farish & Farish, West Palm Beach, for appellant.

Manley P. Caldwell and Arthur E. Barrow of Caldwell Pacetti Barrow & Salisbury, Palm Beach, for appellee.

PER CURIAM.

Appellant, Warren G. Williams, Jr., sustained severe personal injuries as a result of a collision between the vehicle he was operating and a Seaboard train. His negli-

gence action against the railroad proceeded to trial before a jury as a result of which plaintiff was awarded a judgment. However, that judgment was reversed and the cause remanded for a new trial.[1] Upon remand, the case was tried before the court without a jury resulting in a judgment for the railroad from which this appeal has been taken.

In the final judgment, the court found that "the greater weight of the evidence does not support the claim of the plaintiff", and further found that "the greater weight of the evidence does support defendant's defense of contributory negligence". It is obvious that the trial court intended the latter finding to be an alternative one, that is to say, even if the court had found from the evidence that negligence on the part of the railroad was a legal cause of the collision, the outcome of the case would not be affected since the court found the plaintiff's negligence to be a legal cause of the collision. Appellant's sole point on appeal is the sufficiency of the evidence to sustain either of these findings.

Certain facts were without dispute. The collision occurred at a grade crossing within the city limits of West Palm Beach on July 29, 1963, at approximately 5:05 a.m., at that point in predawn darkness where night begins to merge into daybreak. Appellant was operating a van-type milk truck used for retail delivery. The crossing, with which appellant was familiar, was marked only by a wooden crossbuck. Appellant was westbound, the train southbound. Municipal ordinances, in effect for a number of years prior to the collision, required the railroad to install automatic electric signal devices at the crossing, or alternatively, to provide a manned crossing gate, and also established the lawful speed limit for trains over the crossing at 30 miles per hour.

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[1] Seaboard Airline Railroad Co. v. Williams, Fla.1967, 199 So.2d 469.

Other facts were in dispute. There was a substantial conflict in the evidence relating to such matters as the condition and visibility of the crossing, the speed of the train at the time of the collision, whether the train's headlight was operating and proper warning signals were given as the train approached the crossing, and the conduct of appellant as he approached and then entered the crossing. Appellant testified that he approached the crossing slowly and with caution because he knew it was uneven and bumpy and could cause the milk cartons to fall forward on him if he was not careful, that he stopped at the crossing, looked both ways and saw no train approaching, and then proceeded slowly forward onto the tracks. In support of his case he produced the expert opinion testimony of a consulting professional engineer and the eyewitness accounts of Mr. and Mrs. Carlton who lived not far from the crossing and who had glanced at the train immediately prior to the collision. Based upon a measurement of the braking distance and the known weight of the train and its cargo, the expert witness offered the opinion that the train was travelling between 40 and 50 miles per hour at the time of the collision. This estimate was supported by the testimony of the Carltons, who further testified that they heard no whistle nor bell, nor recalled seeing a headlight on the train, before they heard the sound of the collision. Conflicting with such evidence was the testimony of various members of the train crew who testified that as the train approached the crossing its speed was between 20 and 30 miles per hour, the headlight was burning, the whistle blowing, and the bell ringing, both of these audible signals having been commenced at the whistle post north of the crossing. Two members of the train crew, who were in the engine on the left side, testified that they were keeping a lookout ahead and had seen appellant's truck slowly approaching the crossing from the east, that the truck's interior light was on enabling them to see appellant in the truck, and that he appeared to be looking at something in the truck. One of these witnesses testified that appellant

first stopped at the crossing and then proceeded slowly across in the train's path, while the other testified that appellant did not stop but continued at the same slow pace until struck. Both described the immediate application of emergency brakes the moment it became apparent that appellant was moving into the train's path.

Of course, determining the credibility of the witnesses and the weight to be given to their testimony is properly a function of the trier of fact.[2] When the sufficiency of the evidence is challenged on appeal, the appellate function is to determine if there is in the record substantial competent evidence which supports the finding made by the trier of fact [3] and in doing this the evidence in the record, together with all inferences reasonably and fairly to be drawn therefrom, must be considered in the light most favorable to the prevailing party.[4]

Applying these principles, the only uncontradicted evidence of negligence on the part of the railroad is its failure to comply with the municipal ordinance requiring installation of automatic electric signal devices at the crossing, or, as an alternative, to provide a manned crossing gate. However, if the court (as trier of fact) accepted as true the other evidence favorable to the defendant's position, it could have concluded that the failure to have such signal device at the crossing was not a legal cause of the collision. Aside from the issue of the railroad's negligence being a

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[2] Peterson v. Hancock, 1941, 146 Fla. 410, 1 So.2d 255, and cases cited therein; Povia v. Melvin, Fla. 1953, 66 So.2d 494, and Commercial Credit Corporation v. Varn, Fla.App.1959, 108 So.2d 638.

[3] Marcus v. Hull, 1939, 142 Fla. 306, 195 So. 170 and cases cited therein; Nelson v. State ex rel. Quigg, 1945, 156 Fla. 189, 23 So.2d 136, and cases cited therein; and Smith v. Biscayne Park Estates, Fla. 1949, 42 So.2d 442.

[4] Martin v. Tindell, Fla. 1957, 98 So.2d 473; Commercial Credit Corporation v. Varn, Fla.App.1959, 108 So.2d 638; and Prince Michael Corp. v. Zucker, Fla.App.1962, 147 So.2d 332.

legal cause of the collision, we are led inescapably to the conclusion that the record contains substantial competent evidence, which (when viewed most favorably to the railroad as the prevailing party) supports the finding of contributory negligence on the part of appellant as a legal cause of the collision. It is an irrefutable physical fact that the train was approaching the crossing as appellant drove his vehicle slowly onto the tracks, and that the forward end of the train struck appellant's vehicle broadside. If the trier of fact concluded that the train was being operated in the manner described by the train crew, then appellant's conduct in driving the vehicle directly into the path of the oncoming train could fairly be characterized by the trier of fact as negligence which was a legal cause of the collision.

Appellant contends that any contributory negligence on his part should not bar a recovery because the railroad was guilty of wilful, wanton and reckless misconduct as to which contributory negligence is not a defense. This is a correct principle of law (see Johnson v. Rinesmith, Fla. App. 1969, 238 So. 2d 659, and authorities therein cited) but wholly inapplicable to appellant's case. This issue was not raised in the pleadings or presented to the trial court and in fact the case went to trial on the issue of defendant's negligence and plaintiff's contributory negligence. Furthermore, if the trier of fact concluded that plaintiff had not carried his burden to show the defendant guilty of ordinary negligence which was a legal cause of the collision, appellant necessarily failed to prove wilful, wanton and reckless misconduct on the part of the railroad.

Appellant having failed to carry his burden of demonstrating error, the judgment is affirmed.

AFFIRMED.

REED, C.J., and OWEN, J., concur.

MCCAIN, DAVID L., Associate Judge, dissents, with opinion.

McCain, David L., Associate Judge, dissents, with opinion:

I must respectfully dissent from the majority herein.

The retrial below was conducted before a judge of the Palm Beach County Circuit Court sitting with a jury. Portions of the transcript of the first trial were admitted by stipulation of the litigants, and my treatment of the testimony and the evidence will be made without reference to whether it was stipulated, or appeared fresh in the retrial. The collision occurred within the city limits of West Palm Beach, Florida; all other pertinent facts appear in the body of my dissent. The litigants will be referred to as plaintiff and defendant, according to their status below.

At the outset, I am concerned with the language used by the Circuit Court in announcing its final judgment on retrial. In part, the Court stated:

> "At this point, close of evidence, the Court became the trier of fact and occupied the position of a jury. It then became the Court's function to weigh the evidence and determine its credibility. This has been done and the Court concludes that the greater weight of the evidence does not support the claim of the Plaintiff. The Court further concludes that the greater weight of the evidence does support Defendant's defense of contributory negligence thus barring his claim under the present holding of the Supreme Court of Florida."

A ruling that the plaintiff has failed to demonstrate negligence by a preponderence of the evidence is inconsistent with a ruling that an affirmative defense is deemed successful. A pleading of this defense constitutes an admission of negligence in the form of a confession and an avoidance. Not only is this so, but affirmative defenses are considered only when the greater weight of evidence supports the plaintiff; only then does it become appropriate to consider defenses so as to determine if the greater weight of the evidence supports the defense. Green v. Atlantic Co., Fla. 1952, 61 So.2d 185; 23 Fla. Jur. Negligence § 110. I

cannot construe the court's finding to be in the alternative. If so, it would have been an easy matter to set forth.

If this inconsistency stood alone, I would consider simply remanding for further consideration. However, as this case is postured, it is evident to me that: (a) plaintiff has proved his case by a preponderance of the evidence; (b) the defendant did not meet its burden of proving contributory negligence by a preponderance of the evidence; (c) the actions of the defendant were sufficient under the totality of the circumstances to justify a characterization of "wilful, wanton, and reckless misconduct".

The issue of plaintiff's proof by a preponderance of the evidence is inherently discussed in connection with the last point regarding defendant's misconduct, and therefore need not be treated separately. Accordingly, I first examine defendant's burden of proving contributory negligence by a preponderance of the evidence. The doctrine of contributory negligence was again made applicable to railroad crossing cases when the Florida Supreme Court declared Fla. Stat. § 768.06 (1965), the railroad comparative negligence statute, unconstitutional in Georgia Southern & Florida Ry. Co. v. Seven-Up Bott. Co., Fla. 1965, 175 So. 2d 39. Sanders v. Florida East Coast Ry. Co., Fla. App. 1968, 216 So.2d 49; Seaboard Coastline R. Co. v. Scudder, Fla. App. 1968, 215 So.2d 760. Under this doctrine, the defendant must prove the defense bya preponderance of the evidence. C. W. Zaring & Co. v. Dennis, 1944, 155 Fla. 150, 19 So.2d 701. In speaking of this burden, the Florida Supreme Court said in Green v. Atlantic Co., supra, at 186:

> "This Court is committed to the doctrine that the plea of contributory negligence not only admits negligence on the part of the defendant but places on him the burden of proving his plea. He must show that the plaintiff failed to exercise reasonable care for his safety or that he unduly exposed himself to danger and that his failure to do this was responsible for his injury..."

See also Nelson v. Ziegler, Fla. 1956, 89 So.2d 780.

Here the only evidence presented by the railroad was, in effect, that plaintiff's milk truck was hit on the tracks by a train that allegedly had its warning devices operating. On the other hand, plaintiff testified that he stopped at the crossing and proceeded only after he looked both ways. This was supported by a milk company supervisor, and another driver, who both testified that the condition of the approach to the crossing was known by all drivers to be uneven and bumpy; and further that they all knew that milk cartons would fall forward on the driver unless the crossing was approached with great caution. The train conductor testified that, as the train rounded a curve approaching the intersection, he saw plaintiff bring his truck to a halt before slowly moving on. A train firemen testified that plaintiff did not stop. Plaintiff also testified that he heard no horns or whistles, and saw no train lights. Additionally, Mr. and Mrs. James E. Carlton, a couple that had gotten up to feed farm animals at their home near the tracks, testified that they saw the train go by without noticing any warning signals or lights just before the collision. Members of the train crew, on the other hand, said that all lights and signals were operating.

With the admission of negligence inherent in the plea of the affirmative defense, the defendant bore the responsibility announced in *Green, supra,* of demonstrating by a *preponderance* of the evidence that plaintiff was contributorily negligent. I do not think the defendant has met that burden, especially in light of the other factors which I will now consider.

First, I note that § 40-1 (1962) of the West Palm Beach, Florida, City Traffic Code, in effect at the time of the accident, required defendant to install automatic electric signal devices at the crossing, or alternatively, to provide a manned crossing gate. Notwithstanding the fact that this ordinance was in effect since 1948, fifteen years before the accident, the only warning at the crossing was in the form of a wooden crossbuck. Failure to comply with an ordi-

nance of this nature is evidence of negligence, and the familiarity of a plaintiff with the fact that the crossing exists is of no consequence. Jones v. Florida East Coast R. Co., Fla. App. 1969, 220 So.2d 922. Had proper traffic signals been installed in accord with the traffic code, plaintiff would have been alerted to the onrushing train, no matter how fast it was approaching. See also St. Louis-San Francisco Railway Company and Howell H. Abrams v. Burlison and Rouse, Fla. App. 1972, 262 So.2d 280.

Second, I further note that Chapter 40, § 40-2 (1962), West Palm Beach Municipal Ordinance, relating to the speed of trains and in effect at the time of the accident, established the lawful speed limit for trains over the crossing at 30 miles per hour maximum. Although the train engineer and the conductor estimated their speed coming around the curve to be between 20 and 30 miles per hour, a consulting engineer determined by measurement of braking marks that the train was traveling between 40 and 50 miles per hour at the time of the collision. This estimate is supported by testimony of Mr. and Mrs. Carlton, that the train was moving fast. Living by the rails and accustomed to train traffic and speeds, the couple's disinterested description of the speed of the train just prior to collision is highly significant. Again, violation of an ordinance of this nature is evidence of negligence. Jones v. Florida East Coast R. Co., supra.

Of course, contributory negligence is a proper defense in those cases where the defendant's negligence consists of the violation of an ordinance not designed to protect a class of persons from their inability to exercise self-protective care. Richardson v. Fountain, Fla. App. 1963, 154 So.2d 709. But the negligence on the part of the defendant evident here goes beyond a simple violation of ordinances. The totality of the circumstances involved raises the conduct of the defendant to the level of wilful, wanton and reckless misconduct. Our jurisprudences has long recognized that

a characterization of this nature can arise out of a composite of lesser circumstances taken in combination; see e.g., Hodges v. Helm, Fla. 1969, 222 So.2d 418.

Let us examine the composite presented here. The collision occurred in predawn darkness at that point in time when night merges into daybreak. In that semi-darkness, plaintiff brought his truck to a stop and looked both ways, before proceeding slowly across the tracks. At that point, the train rounded a curve and came onto the crossing at an unlawful speed determined to be between 40 and 50 miles per hour, a determination supported by disinterested witneesses, notwithstanding contrary testimony by some of the members of the train crew. Though the road was known to be heavily traveled, no proper warning signals as required by law were stationed at the crossing. Taking together the limited visibility, the fact that the road was known to be heavily traveled, the fact that the approach to the crossing intersection was around a curve in the tracks, the fact that the train speed was excessive under prevailing conditions and under the controlling ordinance, and the fact that proper warning signals required by ordinance were disregarded, I find a composite evincing a wilful, wanton and reckless disregard for the safety of traffic, and particularly, for the safety of plaintiff. Even assuming that the train's warning devices were operational, and disregarding testimony to the contrary, the speed of the train was sufficient to bring about a collision before plaintiff could have been aware of the presence of the onrushing train.

If plaintiff was negligent in any fashion, this negligence in no way contributed proximately to the cause of his own injury. See Nelson v. Ziegler, *supra*. Moreover, any issue of negligence on the part of plaintiff is removed from consideration under the facts of this case because contributory negligence is not a defense to wilful, wanton and reckless misconduct. Fla. Ry. Co. v. Dorsey, 1910, 59 Fla. 260, 52 So. 963; Fla. So. Ry. Co. v. Hirst, 1892, 30 Fla. 1, 11 So. 506;

Johnson v. Rinesmith, Fla. App. 1970, 238 So.2d 659 (on reh.).

In conclusion, I find that the trial court erred in finding that plaintiff did not meet the burden of proof required of him; that the trial court erred in finding that defendant had supported its affirmative defense with adequate proof; finally, that the trial court erred in not finding that defendant's actions constituted wilful, wanton and reckless misconduct.

Accordingly, I would reverse the judgment appealed from and remand the cause for proceedings consistent with these views.

APPENDIX C

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1967

CASE No. 35,718

SEABOARD AIR LINE RAILROAD COMPANY, a foreign corporation, authorized to do business in the State of Florida, *Petitioner,*

v.

WARREN G. WILLIAMS, JR., *Respondent.*

Opinion filed May 24, 1967

Writ of Certiorari to the District Court of Appeal, Fourth District

Manley P. Caldwell of Caldwell, Pacetti & Barrow and Chas. S. Ausley of Ausley, Ausley, McMullen, O'Bryan, Michaels & McGehee, for Petitioner

Farish & Farish and Jos. D. Farish, Jr., for Respondent

PER CURIAM.

On July 29, 1963 respondent Williams was injured in an accident involving one of petitioner's trains. After trial in which the jury was charged on the doctrine of comparative negligence judgment in sum of $141,750.00 was entered for respondent on July 3, 1964. Petitioner appealed to the District Court of Appeal, Second District. While that appeal was pending this court on May 12, 1965 entered its decision in *Georgia Southern and Florida Railway Company* v. *Seven-Up Bottling Company of Southeast Georgia, Inc.*, Fla. 1965, 175 So. 2d 39. In that case Section 768.06, F.S., the railroad "comparative negligence" statute, was held unconstitutional.

Immediately following the filing of our decision in the *Georgia Southern* case petitioner moved the district court for leave to amend its assignment of errors to include an assignment asserting the unconstitutionality of Section 768.06 and also moved the court to remand the cause for new trial, basing its motions on the decision in the *Georgia Southern* case. These motions were denied and following creation of the District Court of Appeal, Fourth District, the cause was transferred to that court. The latter court subsequently entered its decision "Per Curiam. Affirmed." In a petition for rehearing the petitioner railroad again called to the attention of the district court our opinion in the *Georgia Southern* case and informed that court of the pendency in this court on petition for certiorari of two cases involving the same question. *Florida East Coast Railway Company* v. *Rouse*, Fla. App. 1965, 178 So. 2d 882, and *Atlantic Coast Line Railroad Company, et al.* v. *Braz*, Fla. App. 1966, 182 So. 2d 491. The petition for rehearing was denied and petitioner railroad filed its petition for certiorari in this court.

On January 9, 1967, prior to our hearing argument in this cause, we filed our opinions in *Florida East Coast Railway Company* v. *Rouse*, Fla. 1967, 194 So. 2d 260, and

Atlantic Coast Line Railway Company, et al. v. *Braz,* 196 So. 2d 109. In each of those cases the petitioner railroads did not attack the validity of Section 768.06 at the trial but raised the issue for the first time on appeal in the district court. Holding that an appellate court is required to apply the law as it existed at the time of the appeal this court reversed and remanded both causes for new trial under the law as settled in the *Georgia Southern* case.

Under our decision in *Foley* v. *Weaver,* Fla. 1964, 177 So. 2d 221 we are permitted to examine the record proper to determine if conflict in decisions exists. The situation presented by this case demonstrates the necessity for and wisdom of the rule in Foley.

In this cause, as in *Rouse* and *Braz,* the trial judge charged the jury on comparative negligence pursuant to Section 768.06. In neither cause was the validity of the statute or the correctness of the charges thereon raised until the judgments were in the district courts on appeal. In each cause the district courts affirmed the judgments despite the fact that we had in the *Georgia Southern* case held the subject statute invalid and remanded that cause for new trial because the jury was charged thereunder. In each the Rouse and Braz cases we remanded for new trials free of charges under the invalid statute.

If the per curiam decision in this cause is permitted to stand the result will be, and it is obvious for all to see, that the rule of law applicable at the time of appellate decision will have been applied in the two cases while a different erroneous rule will have been applied in the third. Another consequence, equally repugnant to the even handed administration of justice, is that because of an unforeseeable but later determined error the defendants in two causes will be given new trials yet the defendant in the third will not. Consistency and uniformity in the administration of justice ought to exist to the point that this result not be sanctioned.

For these reasons the decision of the district court is quashed with directions that the cause be remanded to the trial court for a new trial.

It is ordered.

ROBERTS, O'CONNELL and CALDWELL, JJ., concur

DREW, J., concurs specially with opinion

THORNAL, C.J., THOMAS and ERVIN, JJ., dissent

DREW, J., concurring specially:

I did not agree with the majority in Florida East Coast Railway Company v. Rouse, Fla. 1967, 194 So.2d 260, and in Atlantic Coast Line Railway Company, et al., v. Braz, 196 So.2d 109, on the identical issue which is involved in this case. My views are fully set forth in my dissenting opinion in each of those cases. Further discussion here would serve no useful purpose. Both cases received minute consideration and long deliberation before the ultimate judgment was reached and although I dissented, I consider the law there announced to be binding upon me as a Justice of this Court in the disposition of this case. Uniformity of decisions in our jurisdiction and the basic concept of equal justice under law simply require the result reached in the majority opinion. Any other conclusion would produce a judicial absurdity.

In my concurring opinion in Foley v. Weaver Drugs, Fla. 1965, 177 So.2d 221, I observed: "I think it would result in utter chaos in the judicial system of this State with three separate District Courts, and the possibility of a fourth in the near future, if it were impossible for this Court to maintain consistency and uniformity of the law in [decisions of such district courts merely affirming without opinion]. . . ." What has occurred in this case fulfills that prophecy. I, therefore, concur in the foregoing majority opinion.

O'CONNELL, J. concurs

APPENDIX D

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JULY TERM 1966

SEABOARD AIR LINE RAILROAD COMPANY, *Appellant*

v.

WARREN C. WILLIAMS, JR., *Appellee*

CASE NO. 85

Decision filed July 26, 1966.

Appeal from the Circuit Court for Palm Beach County; Culver Smith, Judge.

Manley P. Caldwell and Arthur E. Barrow of Caldwell Pacetti Foster & Barrow, Palm Beach, for appellant.

Joseph D. Farish, Jr., and Harry Lee Anstead of Farish & Farish, West Palm Beach, for appellee.

PER CURIAM.

Affirmed.

ANDREWS, A.C.J., WALDEN, J., and RAWLS, JOHN S., Associate Judge, concur.

APPENDIX E

Railroad Comparative Negligence Statute, Section 768.06, Florida Statutes, F.S.A.

> "No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the plaintiff and the agents of the company are both at fault, the former may recover, but the amount of recovery shall be such a proportion of the entire damages sustained, as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant."

APPENDIX F

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A.D. 1973

PHILIP FRANCIS HOFFMAN, JR., and PAV-A-WAY CORPORATION, a Florida corporation,

Petitioners

v.

HAZEL J. JONES, as Administratrix of the Estate of WILLIAM HARRISON JONES, JR., deceased,

Respondent

CASE NO. 43,443

Opinion filed July 10, 1973.

Writ of Certiorari to the District Court of Appeal, Fourth District.

Edna L. Caruso of Howell, Kirby, Montgomery, D'Aiuto, Dean and Hallowes for Petitioners.

Sammy Cacciatore of Nance & Cacciatore for Respondent.

E. Harper Field and Frank C. Amatea of Keen, O'Kelley & Spitz, for Amicus Curiae—Florida Defense Lawyers Association.

C. Graham Carothers and C. DuBose Ausley of Ausley, Ausley, McMullen, McGhee & Carothers, for Amicus Curiae, Florida Railroad Assocaition.

Kenneth L. Ryskamp of Bolles, Goodwin, Ryskamp & Welcher, for Amicus Curiae, Florida East Coast Railway Company.

William B. Killian of McCarthy, Steel, Hector & Davis, for Amicus Curiae, Florida Power & Light Company.

Sam H. Mann, Jr. and John T. Allen, Jr., of Harrison, Greene, Mann, Davenport, Rowe & Stanton, for Amicus Curiae, Florida Power Corp.

Raymond Ehrich and James E. Cobb, for Amicus Curiae, American Mutual Ins. Alliance, American Ins. A8sso., and National Asso. of Independent Insurers.

Thomas W. McAliley of Beckham & McAliley, for Amicus Curiae, United Transportation Union, Florida Legislative Boards of Railroad Brotherhoods and the Florida AFL-CIO.

ADKINS, J.

This cause is here on petition for writ of certiorari supported by certificate of the District Court of Appeal, Fourth District, that its decision (*Jones v. Hoffman*, 272 So.2d 529) is one which involves a question of great public interest.

See FLA. CONST., art. V, § 3(b)(3), F.S.A.

The question certified by the District Court of Appeal is:

> "Whether or not the Court should replace the contributory negligence rule with the principles of comparative negligence?"

The District Court of Appeal answered the certified question in the affirmative and reversed the trial court in the case*sub judice* for following the precedent set down by this Court in *Louisville and Nashville Railroad Co.* v. *Yniestra*, 21 Fla. 700 (1886). This early case specifically held the contributory negligence rule to be the law of Florida, and it has uniformly been followed by the courts of the State ever since. The District Court of Appeal attempted, therefore, to overrule all precedent of this Court in the area of contributory ngligence and to stablish comparative negligence as the proper test. In so doing, the District Court has exceeded its authority.

In a dissenting opinion, Judge Owen stated well the position of the District Courts of Appeal when in disagreement with controlling precedent set down by this Court:

> "[I]f and when such a chance is to be wrought by the judiciary, it should be at the hands of the Supreme Court rather than the District Court of Appeal.... The majority decision would appear to flatly overrule a multitude of prior decisions of our Supreme Court, a prerogative which we do not enjoy." *Jones* v. *Hoffman*, 272 So.2d 529, p. 529, p. 534.

The other District Courts of Appeal have recognized the relationship between their authority and that of this Court. *Griffin* v. *State*, 202 So.2d 602 (Fla. App. 1st, 1967); *Roberts* v. *State*, 199 So.2d 340 (Fla. App. 2d, 1967); and *United States* v. *State*, 179 So.2d 890 (Fla. App. 3d, 1965). To allow a District Court of Appeal to overrule controlling precedent of this Court would be to create chaos and uncertainty in the judicial forum, particularly at the trial level. Ever since the District Court rendered its opinion there has been great confusion and much delay in the trial courts of the District Court of Appeal, Fourth District, while the attorneys and judges alike have been awaiting our decision in this case.

We point out that the mere certification to this Court by a District Court of Appeal that its decision involves a question of great public interest does not vest this Court with jurisdiction. If neither party involved petitioned here to a writ of certiorari, we would not have jurisdiction to answer the question certified or to review the District Court's action.

This is not to say that the District Courts of Appeal are powerless to seek change; they are free to certify questions of great public interest to this Court for consideration, and even to state their reasons for advocating change. They are, however, bound to follow the case law set forth by this Court.

Prior to answering the question certified, we must also consider our own power and authority to replace the rule of contributory negligence with that of comparative negligence. It has been suggested that such a change in the common law of Florida is properly within the province only of the Legislature, and not of the courts. We cannot agree.

The rule that contributory negligence is an absolute bar to recovery was—as most tort law—a judicial creation, and it was specifically judicially adopted in Florida in *Louisville*

and Nashville Railroad Co. v. *Ynicstra, supra.* Most scholars attribute the origin of this rule to the English case of *Butterfield* v. *Forrester*, 11 East 60, 103 Eng. Rep. 926 (K.B. 1809), although as much as thirty years later—in *Raisin* v. *Mitchell*, 9 Car. & P. 613, 173 Eng. Rep. 979 (C. P. 1839)—contributory negligence was held not to be a complete bar to recovery. MALONEY, FROM CONTRIBUTORY TO COMPARATIVE NEGLIGENCE: A NEEDED LAW REFORM, 11 U.Fla.L.Rev. 135 141-142 (1958). Although "contributory negligence" itself had been mentioned in some earlier cases, our research reveals that prior to 1809 (as well as for a time after that date) there was no clear-cut, common law rule that contributory negligence was a complete defense to an action based on negligence. Most probably, the common law was the same in this regard as English maritime law and the civil law—i.e., damages were apportioned when both plaintiff and defendant were at fault. See MALONEY, *supra*, page 152. Many authorities declare that early reference to "contributory negligence" did not concern contributory negligence as we are familiar with it—i.e., lack of due care by the plaintiff which contributes to his injuries—but that it originally meant a plaintiff's own negligent act which was the effective, *direct cause* of the accident in which he was injured. E.G., TURK, COMPARATIVE NEGLIGENCE ON THE MARCH, 28 Chi-Kent L.Rev. 189, p. 196 (1950).

Prior to *Butterfield* v. *Forrester, supra*, there was no clear-cut pronouncement of the contributory negligence rule, so it must be said that "judicial thinking" culminated in the implicit pronouncement of the contributory negligence rule in the 1809 decision of *Butterfield* v. *Forrester, supra.* In view of the fact that prior to *Butterfield* contributory negligence was a matter of judicial thought rather than judicial pronouncement, it cannot be said that the common law was "clear and free from doubt," so as to make it a part of the statute law of this State by virtue of FLA. STAT., § 201, F.S.A.

As we stated in *Duval* v. *Thomas,* 114 So.2d 791, 795 (Fla. 1959), it is "only when the common law is plain that we must observe it." We also said in this case,

> "[W]hen grave doubt exists of a true common law doctrine . . . we may, as was written in Ripley v. Ewell, supra, exercise a 'broad discretion' taking 'into account the changes in our social and economic customs and present day conceptions of right and justice.' "

Even if it be said that the present bar of contributory negligence is a part of our common law by virtue of prior judicial decision, it is also true from *Duval* that this Court may change the rule where great social upheaval dictates. It has been modified in many instances by judicial decision, such as those establishing the doctrines of "last clear chance," "appreciable degree" and others. In a large measure the rule has been transfigured from any "statutory creation" by virtue of our adoption of the common law (if such it were) into decisional law by virtue of various court refinements. We have in the past, with hesitation, modified the common law justified instances, and this is as it should be. *Randolph* v. *Randolph,* 1 So.2d 480 (Fla. 1941), modified the common law doctrin that gave a father the superior right to the custody of a child; *Banfield* v. *Addington,* 104 Fla. 661, 140 So. 893 (1932), removed the common law exemption of a married woman from causes of action based on contract or mixed contracts in tort.

In *Waller* v. *First Savings & Trust Co.,* 103 Fla. 1025, 138 So.2d 780 (1931), this Court refused to follow the common law principle that an action for personal injuries was abated upon the death of the tortfeasor, the Court saying:

> "This Court has expressly recognized the principle that in specific instances certain rules which were admittedly a part of the old English common law did not become a part of the Florida common law, because contrary to our customs, institutions, or intendments of our statutes on other subjects." (p. 784)

This Court receded from the common law and held, in *Hargrove* v. *Town of Cocoa Beach,* 96 So.2d 130 (Fla. 1957), that a municipal corporation may be held liable for the torts of police officers under the doctrine of *respondeat superior,* saying:

> "Tracing the rule to its ultimate progenitor we are led to the English case of Russel v. Men of Devon, 2 T.R. 667, 100 Eng.Rep.R. 359 (1788). . . .
>
> "Assuming that the immunity rule had its inception in the Men of Devon case, and most legal historians agree that it did, it should be noted that this case was decided in 1788, some twelve years after our Declaration of Independence. Be that as it may, our own feeling is that *the courts should be alive to the demands of justice. We can see no necessity for insisting on legislative action in a matter which the courts themselves originated.*" (Emphasis supplied) (p. 132)

Gates v. *Foley,* 247 So.2d 40 (Fla. 1971), established the right of a wife to recover for the loss of consortium as a result of her husband's injuries. This decision receded from *Repley* v. *Ewell,* 61 So.2d 420 (Fla. 1952) and abrogated a common law principle, saying:

> "It may be argued that any change in this rule should come from the Legislature. No recitation of authority is needed to indicate that this Court has not been backward in overturning unsound precedent in the area of tort law. *Legislative action could, of course, be taken, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.*" (Emphasis supplied) 247 So.2d 40, p. 43)

All rules of the common law are designed for application to new conditions and circumstances as they may be developed by enlightened commercial and business intercourse and are intended to be vitalized by practical application in advanced society. One of the most pressing social problems facing us today is the automobile accident problem, for the

bulk of tort litigation involves the dangerous instramentality known as the automobile. Our society must be concerned with accident prevention and compensation of accident. The Legislature of Florida has made great progress in legislation geared for accident prevention. The prevention of accidents, of course, is much more satisfying than the compensation of victims, but we must recognize the problem of determining a method of securing just and adequate compensation of accident victims who have good cause of action.

The contemporary conditions must be met with contemporary standards which are realistic and better calculated to obtain justice among all of the parties involved, based upon the circumstances applying between them at the time in question. The rule of contributory negligence as a complete bar to recovery was imported into the law by judges. Whatever may have been the historical justification for it, today it is almost universally regarded as unjust and inequitable to vest an entire accidental loss on one of the parties whose negligent conduct combined with the negligence of the other party to produce the loss. If fault is to remain the test of liability, then the doctrine of comparative negligence which involves apportionment of the loss among those whose fault contributed to the occurrence is more consistent with liability based on a fault premise.

We are, therefore, of the opinion that we do have the power and authority to reexamine the position we have taken in regard to contributory negligence and to alter the rule we have adopted previously in light of current "social and economic customs" and modern "conceptions of right and justice."

Use of the terms "contributory negligence" and "comparative negligence" is slightly confusing. The two theories now commonly known by these terms both recognize that negligence of a plaintiff may play a part in causing his injuries and that the damages he is allowed to recover

should, therefore, be diminished to some extent. The "contributory negligence" theory, of course, *completely* bar recovery, while the "comparative negligence" theory is that a plaintiff is prevented from recovering only that proportion of his damages for which he is responsible.

The demise of the absolute-bar theory of contributory negligence has been urged by many American scholars in the law of torts. It has been abolished in almost every common law nation in the world, including England—its country of origin—and every one of the Canadian Provinces. Some form of comparative negligence now exists in Austria, France, Germany, Portugal, Switzerland, Italy, China, Japan, Persia, Poland, Russia, Siam and Turkey. MALONEY, *supra*, page 154.

Also, our research reveals that sixteen states have so far adopted some form of the comparative negligence doctrine.

One reason for the abandonment of the contributory negligence theory is that the initial justification for establishing the complete defense is no longer valid. It is generally accepted that, historically, contributory negligence was adopted "to protect the essential growth of industries, particularly transportation." Institute of Judicial Administration, *Comparative Negligence—1954 Supplement*, at page 2. Modern economic and social customs, however, favor the individual, not industry.

We find that one of the justifications for denying any recovery to a plaintiff, who has contributed to his own injuries to any extent, has any validity in this age.

Perhaps the best argument in favor of the movement from contributory to comparative negligence is that the latter is simply a more equitable system of determining liability and a more socially desirable method of loss distribution. The injustice which occurs when a plaintiff suffers severe injuries as the result of an accident for which he is only slightly responsible, and is thereby denied any

damages, is readily apparent. The rule of contributory negligence is a harsh one which either places the burden of a loss for which two are responsible upon only one party or relegates to Lady Luck the determination of the damages for which each of two negligent parties will be liable. When the negligence of more than one person contributes to the occurrence of an accident, each should pay the proportion of the total damages he has caused the other party.

In an effort to ameliorate the harshness of contributory negligence, other doctrines have evolved in tort law such as "gross, willful, and wanton" negligence, "last clear chance" and the application of absolute liability in certain instances. Those who defend the doctrine of contributory negligence argue that the rule is also not as harsh in its practical effect as it is in theory. This is so, they say, because juries tend to disregard the instructions given by the trial judge in an effort to afford some measure of rough justice to the injured party. We agree with Dean Maloney that,

> "[T]here is something basically wrong with a rule of law that is so contrary to the settled convictions of the lay community that laymen will almost always refuse to enforce it, even when solemnly told to do so by a judge whose instructions they have sworn to follow. . . .
>
> "[T]he disrespect for law engendered by putting our citizens in a position in which they feel it is necessary to deliberately violate the law is not something to be lightly brushed aside; and it comes ill from the mouths of lawyers, who as officers of the courts have sworn to uphold the law, to defend the present system by arguing that it works because jurors can be trusted to disregard that very law." 11 U.Fla.L.Rev. 135, pp. 151-152 (1958).

In *Connally* v. *Streakley*, 197 So.2d 524, 537 (Fla. 1967), Mr. Justice O'Connell referred to contributory negligence as a "primitive device for achieving justice as between

parties who are both at fault." Even Mr. Chief Justice McWhorter, in authoring the decision which specifically held the contributory negligence doctrine to be the law of this State, referred to it as "unjust and inequitable." *Louisville and Nashville Railroad Co.* v. *Yniestra, supra,* p. 738.

Eighty-seven years after that decision, we find ourselves still laboring under a rule of law that has long been recognized as inequitable. The Legislature did enact a statute in 1887 which applied the principle of comparative negligence to railroad accidents. We held the statute unconstitutional under the due process and equal protection clauses of the Federal and State constitutions because it was of limited scope and not of general application. *Georgia Southern & Florida Railway Co.* v. *Seven-Up Bottling Co.,* 175 So.2d 39 (Fla. 1965). Our Legislature again addressed the problem in 1943, when a comparative negligence statute of general application was passed by both houses. This bill was vetoed by the Governor and the Legislature would not override the veto. *Senate Journal,* Regular Session, 1943, pp. 716-717. One man thus prevented this State from now operating under a much more equitable system of recovery for negligent personal injuries and property damage. Since that "defeat," the Legislature has done little to discard the harsh and inequitable contributory negligence rule, perhaps because it considers the problem to be a judicial one.

Since we definitely consider the problem to be a judicial one, we feel the time has come for this Court to join what seems to be a trend toward almost universal adoption of comparative negligence. A primary function of a court is to see that legal conflicts are equitably resolved. In the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault. Comparative negligence does this more completely than contributory negligence, and we would be shirking our duty if we did not adopt the better doctrine.

Therefore, we now hold that a plaintiff in an action based on negligence will no longer be denied any recovery because of his contributory negligence.

If it appears from the evidence that both plaintiff and defendant were guilty of negligence which was, in some degree, a legal cause of the injury to the plaintiff, this does not defeat the plaintiff's recovery entirely. The jury in assessing damages would in that event award to the plaintiff such damages as in the jury's judgment the negligence of the defendant caused to the plaintiff. In other words, the jury should apportion the negligence of the plaintiff and the negligence of the defendant; then, in reaching the amount due the plaintiff, the jury should give the plaintiff only such an amount proportioned with his negligence and the negligence of the defendant. See *Florida Cent. & P. R. Co.* v. *Foxworth*, 41 Fla. 1, 25 So. 838, 79 Am.Stat.Rep. 149 (1899).

This rule should not be construed so as to entitle a person to recover for damage in a case where the proof shows that the defendant could not by the exercise of due care have prevented the injury, or where the defendant's negligence was not a legal cause of the damage. Stated differently, there can be no apportionment of negligence where the negligence of the defendant is not directly a legal cause of the result complained of by the plaintiff. A plaintiff is barred from recovering damages for loss or injury caused by the negligence of another only when the plaintiff's negligence is the sole legal cause of the damage, or the negligence of the plaintiff and some person or persons other than the defendant or defendants was the sole legal cause of the damage.

If plaintiff and defendant are both at fault, the former may recover, but the amount of his recovery may be only such proportion of the entire damages plaintiff sustained as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant. For example,

where it is found that the plaintiff's negligence is at least equal to that of the defendant, the amount awarded to the plaintiff should be reduced by one-half from what it otherwise would have been.

The doctrine of last clear chance would, of course, no longer have any application in these cases. See *Martin* v. *Sussman*, 82 So.2d 597 (Fla. 1955).

We decline herein to dissect and discuss all the possible variations of comparative negligence which have been adopted in other jurisdictions. Countless law review commentaries and treatises can be found which have covered almost every conceivable mutation of the basic doctrine. Suffice it to say that we consider the "pure form" of comparative negligence—as we have phrased it above—to be the most equitable method of allocating damages in negligence actions.

In the usual situation where the negligence of the plaintiff is at issue, as well as that of the defendant, there will undoubtedly be a counterclaim filed. The cross-plaintiff (just as plaintiff in the main suit) guilty of some degree of negligence would be entitled to a verdict awarding him such damages as in the jury's judgment were proportionate with his negligence and the negligence of cross-defendant. This could result in two verdicts—one for plaintiff and one for cross-plaintiff. In such event the Court should enter one judgment in favor of the party receiving the larger verdict, the amount of which should be the difference between the two verdicts. This is in keeping with the long recognized principles of "set off" in contract litigation. The Court's primary responsibility is to enter a judgment which reflects the true intent of the jury, as expressed in its verdict or verdicts.

In rare cases the net result of two such claims will be that the party more responsible for an accident will recover more than the party less responsible. On the surface, this might seem inequitable. However, using an extreme exam-

ple, let us assume that a plaintiff is 80 per cent responsible for an automobile accident and suffers $20,000 in damages, and that the defendant—20 per cent responsible—fortunately suffers no damages. The liability of the defendant in such a case should not depend upon what damages he *suffered*, but upon what damages he *caused*. If a jury found that this defendant had been negligent and that his negligence, in relation to that of the plaintiff, was 20 per cent responsible for causing the accident than he should pay 20 per cent of the total damages, regardless of the fact that he has been fortunate enough to be damaged personally.

Petitioners in this cause, and various amicus curiae who have filed briefs, have raised many points which they claim we must consider in adopting comparative negligence, such as the effects of such a change on the concept of "assumption of risk," and no "contribution" between joint tortfeasors. We decline to consider all those issues, however, for two reasons. One reason is that we already have a body of case law in this State dealing with comparative negligence, under our earlier railroad statute. Much of this case law will be applicable under the comparative negligence rule we are now adopting generally.

The other reason is that it is not the proper function of this Court to decide unripe issues, without the benefit of adequate briefing, not involving an actual controversy, and unrelated to a specific factual situation.

We are fully confident that the trial court judges of this State can adequately handle any problems created by our change to a comparative negligence rule as these problems arise. The answers to many of the problems will be obvious in light of the purposes for which we adopt the rule stated above:

> (1) To allow a jury to apportion fault as it sees fit between negligent parties whose negligence was part of the legal and proximate cause of any loss or injury; and

(2) To apportion the total damages resulting from the loss or injury according to the proportionate fault of each party.

In accomplishing these purposes, the trial court is authorized to require special verdicts to be returned by the jury and to enter such judgment or judgments as may truly reflect the intent of the jury as expressed in any verdict or verdicts which may be returned.

We recognize the thousands of pending negligence cases affected by this decision. In fact, the prospect of a general upheaval in pending tort litigation has always been a deterring influence in considering the adoption of a comparative negligence rule. See Annotation, *The Doctrine of Comparative Negligence*, 32 ALR 3d 463, p. 487. We feel the trial judges of this State are capable of applying this comparative negligence rule without our setting guidelines in anticipation of expected problems. The problems are more appropriately resolved at the trial level in a practical manner instead of a theoretical solution at the appellate level. The trial judges are granted broad discretion in adopting such procedure as may accomplish the objectives and purposes expressed in this opinion.

Determining the time when the comparative negligence rule shall be applied at the trial level presents another problem. The confusion created by the premature adoption of the comparative negligence rule by the District Court of Appeal is further exemplified by the fact that some trial judges, relying on the decision, have applied the rule in the trial of many cases. Other trial judges have conducted their trials in accordance with the law of contributory negligence.

We hold that a District Court of Appeal does not have the authority to overrule a decision of the Supreme Court of Florida. In the event of a conflict between the decision of a District Court of Appeal and this Court, the decision of this Court shall prevail until overruled by a subsequent decision of this Court.

Under the circumstances, we hold that this opinion shall be applied as follows:

1. As to those cases in which the comparative negligence rule has been applied, this opinion shall be applicable.

2. As to those cases already commenced, but in which trial has not yet begun, this opinion shall be applicable.

3. As to those cases in which trial has already begun or in which verdict or judgment has already been rendered, this opinion shall not be applicable, unless the applicability of the comparative negligence rule was appropriately and properly raised during some stage of the litigation.

4. As to those cases on appeal in which the applicability of the comparative negligence rule has been properly and appropriately made a question of appellate review, this opinion shall be applicable.

5. This opinion shall be applicable to all cases commenced after the decision becomes final.

The certified question having now been answered in full, this cause is remanded to the District Court of Appeal, Fourth District, to be further remanded to the Circuit Court for a new trial.

In order to finalize the determination of the question in this case as expeditiously as possible, this decision is made effective immediately and a petition for rehearing will not be allowed.

It is so ordered.

CARLTON, C.J., ERVIN, BOYD, MCCAIN and DEKLE, JJ. CONCUR. ROBERTS, J., DISSENTS WITH OPINION

ROBERTS, J., dissenting.

I must respectfully dissent from the majority opinion in this cause. My primary concern is whether this Court is empowered to reject and replace the established doctrine of contributory negligence by judicial decree.

The sovereign powers of this State are divided into three coordinate branches of government—legislative, judicial and executive—by the Constitution of Florida, Article II, Section 3. Our Constitution specifically prohibits a person belonging to one of such branches from exercising any powers "appertaining to either of the other branches unless expressly provided herein." This Court has been diligent in preserving and maintaining the doctrine of separation of powers, which doctrine was imbedded in both the state and federal constitutions at the threshold of constitutional democracy in this country, and under which doctrine the judiciary has no power to make statutory law. *State ex rel. Hanbury* v. *Tunnicliffe*, 124 So. 279 (Fla. 1929), *Carlton* v. *Matthews*, 137 So. 815 (Fla. 1931), *State* v. *Herndon*, 27 So. 2d 833 (Fla. 1946), *Hancock* v. *Board of Public Instruction of Charlotte County*, 158 So.2d 519 (Fla. 1963), *Holley* v. *Adams*, 238 So.2d 401 (Fla. 1970), *State* v. *Barquet*, 262 So.2d 431 (Fla. 1972).

In the case of *Ponder* v. *Graham*, 4 Fla. 23, 25 (1851), this Court emphatically stated,

> "The fundamental principle of every free and good government is, that these several co-ordinate departments forever remain separate and distinct. No maxim in political science is more fully recognized than this. Its necessity was recognized by the framers of our government, as one too invaluable to be surrendered, and too sacred to be tampered with. Every other political principle is subordinate to it—for it is this which gives to our system energy, vitality and stability. Montesquieu says there can be no liberty, where the judicial are not separated from the legislative powers. 1 Spirit of Laws, page 181. Mr. Madison says these departments should remain forever separate and distinct, and that there is no political truth of greater intrinsic value, and which is stamped with the authority or more enlightened patrons of liberty. Federalist, 270."

Applying this well established doctrine, we held that the matter of changing statutory law is not one to be indulged

by the Court, but is a legislative function. *Kennedy* v. *City of Daytona Beach,* 182 So. 228 (Fla. 1938). Therein, this Court also reaffirmed the principle that the common law, if not abrogated by statute or constitutional provision, is in full force and effect in this state. See also *Bryan* v. *Landis,* 142 So. 650 (Fla. 1932), *Wilson* v. *Renfroe,* 91 So. 2d 857 (Fla. 1957), *Brooks* v. *City of West Miami,* 246 So. 2d 115 (Fla.App. 1971).

It is the statutory law of this state that,

> "The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state." Florida Statutes, Section 2.01, F.S.A.

The doctrine of contributory negligence was a part of the common law of England prior to July 4, 1776, and therefore, is part of the common law of this state pursuant to Florida Statutes, Section 2.01, F.S.A., and is secure from the desires of this Court to supplant it by the doctrine of comparative negligence, provided that it is not inconsistent with the Constitution and laws of the United States and the Constitution and acts of the Legislature of this state. *Ripley* v. *Ewell,* 61 So.2d 791 (Fla. 1959). Furthermore, we have held that courts are bound by the rule of stare decisis to follow common law as it has been judicially declared in previously adjudicated cases. *Layne* v. *Tribune Co.,* 146 So. 236 (Fla. 1933).

The question presently before this Court is whether this Court should replace the doctrine of contributory negligence with the concept of comparative negligence. Sub judice, by applying the doctrine of contributory negligence, the trial court correctly followed the precedent set down by this Court in *Louisville and Nashville Railroad Co.* v. *Yniestra,* 21 Fla. 700 (1886), and its progeny. This Court

in *Yniestra* recognized and described contributory negligence as "the law as it unquestionably stands," 21 Fla. 700, p. 737. We said. "If Mr. Yniestra was himself negligent, and that negligence was the proximate cause of his death, the *law* calls that contributory negligence, and the plaintiff could not recover."

Although the case of *Butterfield* v. *Forrester,* 11 East 60, 103 Eng. Rep. 926 (K.B. 1809), is recognized as a leading case in the area of contributory negligence, such case was not the first pronouncement of the common law doctrine of contributory negligence. Lord Ellenborough wrote in *Butterfield* v. *Forrester,* supra,

> "One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." 11 East 60, 61.

The brief opinions of Bayley, J. and Lord Ellenborough in *Forrester* were merely a restatement of the concept of common law contributory negligence. If this case was the origin of common law contributory negligence, then clearly it would not have been adopted as part of the statutory law of this state through Florida Statutes, Section 2.01, F.S.A., because that decision was rendered subsequent to July 4, 1776.

I note with much interest the comment by Wex S. Malone in, "The Formative Era of Contributory Negligence," 41 Illinois Law Review, 151, to the following effect:

> "The concise opinions of Bayley and Lord Ellenborough in *Butterfield* v. *Forrester* (1809) afford no indication that either of those judges felt at the time that he was charting new paths for law."

Contributory negligence was adopted much earlier as a part of the common law. In *Bayley* v. *Merrell,* Cro. Jac. 386, 79 Eng. Rep. 331 (1606), the Court explicated,

> "[I]f he doubted of the weight thereof, he might have weighed it; and was not bound to give credence to another's speech; *and being his own negligence,* he is without remedy." (Emphasis supplied) Cro. Jac. 386, p. 387, 79 Eng. Rep. 331.

Charles Beach in 1882 traced the doctrine of contributory negligence back to its origin in his treatise on contributory negligence, wherein he set out,

> "Our Anglo-American law of Negligence, including, as of course, that of Contributory Negligence, has come down to us, in ordinary generation, from the civil law of imperial Rome. It is a part of that great debt which the common law owes to the classical and the scholastic jurisprudence." BEACH ON CONTRIBUTORY NEGLIGENCE, § 1, p. 1 (1882). See also: BEACH ON CONTRIBUTORY NEGLIGENCE, 2d Ed., § 1, p. 1 (1892), and BEACH ON CONTRIBUTORY NEGLIGENCE, 3d Ed., Crawford, § 1, p. 1 (1899).

Although he expressed a personal view of dislike for the operation of the principle of contributory negligence, Chief Justice McWhorter recognized in *Louisville and Nashville Railroad Co.* v. *Yniestra,* supra, the inability of this Court to change the common law rule of contributory negligence when he applied the existing law required to the facts of the case before him. He observed,

> "The law, in cases at least where human life is concerned, certainly needs *legislative* revision." (Emphasis supplied) 21 Fla. 700, p. 738.

By virtue of Florida Statutes, Section 2.01, contributory negligence is in force and said doctrine can be modified or replaced only by legislation to the contrary. Interposition of judicial power to make a legislative change in a statute which the Legislature on numerous occasions has refused to do is a clear invasion of the legislative.

Co-Operative Sanitary Baking Co. v. *Shields,* 70 So. 934 (Fla. 1916), involved a personal injury suit wherein plaintiff sought to recover damages for injuries sustained

through the alleged negligence of defendant. Therein, this Court stated, inter alia, that at common law a plaintiff could not recover for injuries to himself caused by the negligence of another if he in any appreciable way contributed to the proximate cause of injury, upon the theory that there is no apportionment of the results of mutual negligence. See also *German-American Lumber Co.* v. *Hannah*, 60 Fla. 76, 53 So. 516, 30 L.R.A. (N.S.) 882. In the *Shields* case, this Court explicitly recited,

> "The only modification of this common-law principle which the Legislature of this state has seen fit to make is in regard to injuries occasioned by railroad companies. See sections 3148, 3149, and 3150 of the General Statutes. *If this common-law principle is to be still further modified, it must be done by the Legislature, as it is beyond the power and province of the courts.* We would also refer to Coronet Phosphate Co. v. Jackson, 65 Fla. 170, 61 South. 318, and Wauchula Manufacturing & Timber Co. v. Jackson, 70 South. 599, decided here at the last term, wherein we followed the principles enunciated in German-American Lumber Co. v. Hannah, supra. If the evidence adduced in the instant case established the fact that the plaintiff's own negligence contributed to the proximate cause of the injuries which he received, then he cannot recover, even though it is also established by the evidence that the defendant was likewise guilty of negligence, whether by acts of commission or omission, which contributed to or formed a part of the proximate cause of the injury. In order to determine this point a careful examination of the evidence is requisite." (Emphasis supplied) supra, at p. 936.

In fine, the primary question is not whether or not the law of contributory negligence should be changed, but rather, who should do the changing. Contributory negligence was recognized in the common law as far back as A. D. 1606 and made a part of the statute law of this State in A. D. 1829, and thus far not changed by statute. If such a fundamental change is to be made in the law, then such modification should be made by the legislature where pro-

posed change will be considered by legislative committees in public hearing where the general public may have an opportunity to be heard and should not be made by judicial fiat. Such an excursion into the field of legislative jurisdiction weakens the concept of separation of powers and our tripartite system of government.

For the foregoing reasons, I respectfully dissent.

APPENDIX G

IN THE SUPREME COURT OF FLORIDA

CASE No. 43,088

WARREN G. WILLIAMS, JR., *Petitioner*

VS.

SEABOARD AIRLINE RAILROAD CO., ETC., *Respondent*

Petition for Re-Hearing

Respondent, SEABOARD COAST LINE RAILROAD CO., requests that the Court reconsider the opinion filed in this case on July 31, 1973, and grant a re-hearing thereon, for the following reasons:

1. The Court overlooked the fact that the doctrine of Law of the Case is controlling herein. On May 24, 1967, this Court finally determined that the principle of contributory negligence would be controlling in this case. Having so decided, that opinion became the law of this case and cannot, under any law or decision now existing, be changed for any reason whatsoever.

2. The Court overlooked the fact that the Court was without jurisdiction to hear this case. The opinion recites that the jurisdiction of this Court was based upon an alleged conflict between the opinion rendered in this case by the Fourth District Court of Appeal and the opinion rendered in *Johnson* v. *Rinesmith*. The Court did not find nor

hold that any such conflict existed, and without such finding had no jurisdiction to render an opinion on the merits.

3. The Court overlooked the fact that the issue of comparative negligence as opposed to contributory negligence was not raised in the second trial of this cause. Although it was an issue in the first trial, it was disposed of fully by the Court in its decision of May 24, 1967, including rehearing denied. Therefore, the effect of the Court's decision of July 31, 1973, is to permit re-litigation of issues contrary to the rules of this Court and the principle of res judicata.

4. The Court overlooked the fact that by permitting the Petitioner to re-litigate issues already finally determined by this Court in accordance with Florida Rules of Civil Procedure, the Court does violence to the due process clause of the Fourteenth Amendment of the United States Constitution and § 9 of Article 1 of the Constitution of the State of Florida.

5. The Court overlooked the fact that the issue of comparative negligence opposed to contributory negligence was not properly before the Court. The only issue raised in Petitioner's Petition for Certiorari and Brief in support thereof was the issue of wilful and wanton misconduct to which the Court alludes on page 3 of the opinion of July 31, 1973. Although the Petitioner filed a supplementary brief arguing the comparative negligence opposed to contributory negligence issue, there is no procedure provided in the Rules for such a brief and there was no order of the Court permitting such a brief to be filed. Therefore, that supplementary brief should have been stricken.

6. The Court overlooked the fact that, according to the opinion rendered in *Jones* v. *Hoffman,* the doctrine of comparative negligence would not be applicable unless it had been properly and appropriately made a question of appellate review.

I Hereby Certify that copy of the above Petition for Re-Hearing has been furnished, by mail, this 13th day of August, 1973 to Joseph D. Farish, Jr., Farish & Farish, Denco Building, 316 First Street, West Palm Beach, Florida, 33401.

Caldwell, Pacetti, Barrow & Salisbury

/s/ Charles C. Chillingwitt
Attorneys for Respondent
324 Royal Palm Way
Palm Beach, Florida, 33480
Phone: 655-0620

IN THE SUPREME COURT OF FLORIDA

Case No. 43,088

Supplement To Petition for Rehearing

Respondent, Seaboard Coast Line Railroad Company, files this supplement to its Petition For Rehearing heretofore filed herein, to add the following reasons for the Court to reconsider its opinion:

1. According to the opinion rendered in *Jones* v. *Hoffman,* it is necessary for the jury to be instructed first, to determine the total amount of Plaintiff's damages and, then, assess the damages due Plaintiff by apportioning the negligence of the Plaintiff and the negligence of the Defendant and give the Plaintiff only such an amount proportioned with his negligence and the negligence of the Defendant. The jury, in this case, was not so instructed and, therefore, the case was not tried under the rule of Comparative Negligence as established by *Jones* v. *Hoffman.* The case should, therefore, be re-tried under the proper Comparative Negligence instructions.

2. At the time of the trial of this case, there was no provision for the interrogation of the jury to determine the method used in arriving at its verdict, and therefore, it is impossible to determine whether the jury applied the correct Comparative Negligence formula as set out in *Jones* v. *Hoffman*. Under present rules, provision is made for such interrogation of the jury to ascertain if the verdict might be subject to legal challenge. Under the instant opinion, this right has been denied Respondent.

I Hereby Certify that copy of the above has been furnished, by mail, this 23th day of August, 1973 to Joseph D. Farish, Jr., Farish & Farish, Denco Building, 316 First Street, West Palm Beach, Florida, 33401.

Caldwell, Pacetti, Barrow & Salisbury

/s/ Arthur E. Barrow
Attorneys for Respondent
324 Royal Palm Way
Palm Beach, Florida 33480
655-0620

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1067

SEABOARD AIR LINE RAILROAD COMPANY,
Petitioner,

vs.

WARREN G. WILLIAMS, JR.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondent

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TABLE OF CONTENTS

I. Preface 1

II. Statement of the Case 2

III. Questions Presented 5

IV. Argument—

I. Assuming That the Case Actually Raises a Substantial Federal Question, Has That Question Been Properly Raised at the State Court Level? 8

II. Should Certiorari Be Granted Where It Appears That the Decision of the Supreme Court of Florida Was Based upon Adequate Non-Federal Grounds? 11

III. Do the Facts in This Case Present Questions of Sufficient Public Importance to Invoke the Discretionary Power of This Court to Grant Certiorari? 13

IV. Point I of Petitioner—Whether It Is a Violation of Seaboard's Right of Due Process and Equal Protection of the Law As Guaranteed by the Constitution of the United States for the Supreme Court to Reinstate a Judgment That It Had Previously Reversed Because It Was Based on a State Statute That It Had Declared to Be Unconstitutional? 14

Point II of Petitioner—Whether It Is a Violation of Seaboard's Right to Due Process and Equal Protection of the Law As Guaranteed by the United States Constitution for the Supreme Court of Florida to Give Retrospective Application to a Recent Decision Revitalizing a State

Statute Which It Had Previously Held to Be Invalid and Which Was Not in Effect at the Time the Case Was Tried, Appeal Completed and Petition for Certiorari Filed? 14

Combined and Restated—In Holding *Hoffman* v. *Jones* to Be Applicable to the Instant Case Did the Florida Supreme Court Violate the Petitioner's Constitutional Rights? 14

V. Conclusion 16

Certificate of Service 16

Table of Authorities

Cases

Atlantic Coastline Railroad v. *Mims*, 242 U.S. 532 (1916) 11

Bailey v. *Anderson*, 326 U.S. 203 (1945) 12

Cardinale v. *Louisiana*, 394 U.S. 437 (1969) 10

Central Union Telephone Co. v. *City of Edwardsville*, 269 U.S. 190 (1925) 11

Charleston Federal Savings and Loan Asso. v. *Alderson*, 324 U.S. 182 (1945) 10

Demorest v. *City Bank Farmers T. Co.*, 321 U.S. 36 (1944) 16

Georgia Southern and Florida Railway Co. v. *Seven-Up Bottling Co. of Southeast Georgia, Inc.*, 175 So.2d 39 (Fla. 1965) 2, 3, 13

Gibbs v. *Zimmerman*, 290 U.S. 326 (1933) 15, 16

Hanson v. *Denckla*, 357 U.S. 235 (1958) 10

Henry v. *State of Mississippi*, 379 U.S. 443 (1965), reh. den. 380 U.S. 926 (1965) 9-10, 11

Hill v. *California*, 401 U.S. 797 (1970) 10

Hoffman v. *Jones*, 280 So.2d 431 (Fla. 1973) 3, 4, 8, 9, 11, 12, 13, 14, 16
I. and L. R. Co. v. *McGuire*, 196 U.S. 128 (1905) 12
John v. *Paullin*, 231 U.S. 583 (1913) 11
Jones v. *Hoffman*, 272 So.2d 529 (Fla. 4 DCA 1973) 4, 9
Loftin v. *Crawley's, Inc.*, 8 So.2d 909 (Fla. 1942) 16
McMaster v. *Gould*, 276 U.S. 284 (1927) 11
Monks v. *New Jersey*, 398 U.S. 71 (1970) 10
Newman v. *Gates*, 204 U.S. 89 (1907) 11
Raley v. *State of Ohio*, 360 U.S. 423 (1959) 10
Seaboard Air Line Railroad Co. v. *Williams*, 199 So.2d 469 (Fla. 1967), petition for review denied 390 U.S. 920 (1968) 3
Slagle v. *State of Ohio*, 366 U.S. 259 (1961) 10
Street v. *New York*, 394 U.S. 576 (1969) 12
Wolfe v. *State of North Carolina*, 264 U.S. 177 (1960) 11

STATUTES

Section 768.06, F.S.A. 1959 ..... 2, 3, 13, 16
28 U.S.C. Section 1257(3) 8

OTHER

Stearn and Gressman, Supreme Court Practice, 4th Edition, p. 271 8
Wiener, *Wanna Make a Federal Case Out Of It?* 48 A.B.A.J. 59 (1962) 9

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. _____

SEABOARD AIR LINE RAILROAD COMPANY,
Petitioner,

vs.

WARREN G. WILLIAMS, JR.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

PREFACE

The Petitioner, Seaboard Air Line Railroad Company, presently known as Seaboard Coastline Railroad Company, was the Defendant in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida.

The Respondent, Warren G. Williams, Jr., was the Plaintiff in the Florida Trial Court.

In this brief, the parties will be referred to as they presently stand before this Court or as "Seaboard" and "Williams" respectively.

The following symbols will be used:

"R" Record on Appeal.
"SR" Supplemental Record on Appeal.
"PET" Petitioner's Appendix.

II

STATEMENT OF THE CASE

The Respondent accepts in part and rejects in part the Statement of the Case set forth at pages 4 through 6 of the Petition. It is true, of course, that this is a standard negligence action governed by principles of Florida law. The case was originally tried under Florida Statute Section 768.06, F.S.A. 1959, which provided that the doctrine of "comparative negligence" should govern negligence actions against railroad companies. Throughout the period of time that the case proceeded toward trial, the Petitioner never raised the issue of the statute's constitutionality. After jury verdict and final judgment in favor of the Respondent, the Petitioner appealed to the District Court of Appeal of Florida, Second District (and it was subsequently transferred to the newly formed Fourth District). The Petitioner did not raise any point on appeal in reference to F.S. Section 768.06 or the charge to the jury referenced to the doctrine of "comparative negligence". While the appeal was pending before the District Court, the Florida Supreme Court held F.S. Section 768.06 unconstitutional in *Georgia Southern and Florida Railway Co.* v. *Seven-Up Bottling Co. of Southeast Georgia, Inc.*, 175 So.2d 39 (Fla. 1965). It was only after this decision was raised that the Petitioner raised, for the first time on appeal, an issue as to the constitutionality of the statute. The Petitioner filed two motions before the District Court. The first motion sought an immediate remand to the Trial Court for a new trial under the doctrine of contributory negligence. (SRDist.Ct.-1-10) The second and alternative motion sought leave to amend the assignments of error and to file a supplemental brief based upon the *Seven-Up* decision. (SRDist.Ct.-11, 12) The *Seven-Up* decision provided for no retroactive application.

The District Court therefore refused to apply that decision retroactively and affirmed the Trial Court's final judgment per curiam. (PET-20a)

On Petition for Certiorari to the Florida Supreme Court, the *Seven-Up* decision was given retroactive application to the instant case despite the tardy manner in which the constitutional question was raised. The District Court's opinion was reversed and the case remanded for new trial based upon the principles of contributory negligence. *Seaboard Air Line Railroad Co.* v. *Williams*, 199 So.2d 469 (Fla. 1967). The Respondent then petitioned this Honorable Court for review and asserted that the retroactive application given to the *Seven-Up* decision had deprived him of a vested right in violation of the due process and equal protection guarantees of the United States Constitution. The petition was denied, 390 U.S. 920 (1968).

A retrial based upon "contributory negligence" resulted in a final judgment for the Defendant-Petitioner. A second appeal to the District Court of Appeal, Fourth District, was taken—this time by the Respondent. Again a per curiam affirmance was rendered and the Respondent filed a Petition for Certiorari to the Florida Supreme Court. While the petition was pending, *Hoffman* v. *Jones*, 280 So.2d 431 (Fla. 1973) was decided. That decision replaced the outmoded and unjust doctrine of "contributory negligence" with the modern doctrine of "comparative negligence". Although the Petitioner asserts that the *Hoffman* v. *Jones* decision was relied upon by the Florida Supreme Court to give renewed effect to F.S. Section 768.06 which was previously held unconstitutional, such is not the case. *Hoffman* v. *Jones* held that "comparative negligence" is the doctrine to be applied to *all negligence actions*—not simply in actions against railroad companies. Because of the importance of the *Hoffman* decision, the Florida Su-

preme Court specifically set forth the circumstances under which the "comparative negligence" doctrine should apply. At page 440, the Florida Supreme Court stated:

> "III. As to those cases in which trial has already begun or in which verdict or judgment has already been rendered, this opinion shall not be applicable, *unless the applicability of the comparative negligence rule was appropriately and properly raised during some stage in the litigation.*"

Based upon the precedent established in *Hoffman* v. *Jones* and because the Respondent had continuously asserted the applicability of the "comparative negligence" doctrine and the inapplicability of the "contributory negligence" doctrine and because the case had already been tried once under the doctrine of "comparative negligence", the Florida Supreme Court granted certiorari and held that, "Both justice and common sense mandate that we simply reinstate the original judgment of the Trial Court in this matter." (PET-5a)

At page 6 of the Petition, it is asserted that, "The question of violation of federally guaranteed rights of Seaboard was raised immediately upon realization that the Supreme Court had done violence to them." Such is not the case. Immediately after the rendition of the *Jones* v. *Hoffman* decision, 272 So.2d 529 (Fla. 4 DCA 1973) in the intermediate Appellate Court of Florida, supplemental briefs were filed in the Florida Supreme Court arguing the applicability of the District Court decision to the case sub judice. The Petitioner raised no federal constitutional questions at that time. Even after the Florida Supreme Court rendered its decision in the instant case, no federal constitutional question was presented to the Florida Supreme Court by the Petitioner. Although it filed a petition for rehearing (PET-41a-43a) and supple-

ment to petition for rehearing (PET-43a-44a), the only point at which the constitution was even mentioned was in Paragraph 4 of the petition for rehearing wherein the general conclusionary statement was made that "by permitting the Petitioner to re-litigate issues already finally determined by this Court in accordance with Florida Rules of Civil Procedure, the Court does violence to the due process clause of the Fourteenth Amendment of the United States Constitution and Section 9 of Article 1 of the Constitution of the State of Florida." (PET-42a) Such a brief conclusionary statement raised for the first time on petition for rehearing hardly preserves a constitutional question in the State Court below. Under such circumstances, the Petitioner should not be allowed to raise a constitutional issue for the first time in this Court and the Petition should be denied.

In order to assist the Court in establishing at what point various issues were raised in the Florida Appellate Courts, the Respondent has requested a supplemental record to be certified to this Honorable Court.

III

QUESTIONS PRESENTED

The Respondent takes issue with the questions presented in the Petition and respectfully submits that the questions presented are not dispositive of the true issues raised by the Petition. The Respondent respectfully submits that the questions presented are as follows:

I

ASSUMING THAT THE CASE ACTUALLY RAISES A SUBSTANTIAL FEDERAL QUESTION, HAS THAT QUESTION BEEN PROPERLY RAISED AT THE STATE COURT LEVEL?

II

SHOULD CERTIORARI BE GRANTED WHERE IT APPEARS THAT THE DECISION OF THE SUPREME COURT OF FLORIDA WAS BASED UPON ADEQUATE NON-FEDERAL GROUNDS?

III

DO THE FACTS IN THIS CASE PRESENT QUESTIONS OF SUFFICIENT PUBLIC IMPORTANCE TO INVOKE THE DISCRETIONARY POWER OF THIS COURT TO GRANT CERTIORARI?

IV

Point I of Petitioner

WHETHER IT IS A VIOLATION OF SEABOARD'S RIGHT OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES FOR THE SUPREME COURT TO REINSTATE A JUDGMENT THAT IT HAD PREVIOUSLY REVERSED BECAUSE IT WAS BASED ON A STATE STATUTE THAT IT HAD DECLARED TO BE UNCONSTITUTIONAL?

Point II of Petitioner

WHETHER IT IS A VIOLATION OF SEABOARD'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE UNITED STATES CONSTITUTION FOR THE SUPREME COURT OF FLORIDA TO GIVE RETROSPECTIVE APPLICATION TO A RECENT DECISION REVITALIZING A STATE STATUTE WHICH IT HAD PREVIOUSLY HELD TO BE INVALID AND

WHICH WAS NOT IN EFFECT AT THE TIME THE CASE WAS TRIED, APPEAL COMPLETED AND PETITION FOR CERTIORARI FILED?

combined and restated by the Respondent:

IN HOLDING *HOFFMAN V. JONES* TO BE APPLICABLE TO THE INSTANT CASE DID THE FLORIDA SUPREME COURT VIOLATE THE PETITIONER'S CONSTITUTIONAL RIGHTS?

IV

ARGUMENT

I

Assuming That the Case Actually Raises a Substantial Federal Question, Has That Question Been Properly Raised at the State Court Level?

At page 2 of the Petition it is asserted that 28 U.S.C. Section 1257(3) is relied upon to invoke the jurisdiction of this Court. Obviously, the Florida Supreme Court decision did not pass upon the validity of any treaty or state or federal statute. Therefore, jurisdiction, under the aforementioned United States Code provision, may only lie where a federal title, right, privilege, or immunity was "specifically set up or claimed" in the proper and correct manner. The proper manner to raise the federal question is dependent upon state practice but the law is well-established that it is essential to the vesting of jurisdiction in this Court that the federal question be raised at the state Court level. This, the Petitioner failed to do, and it is for this reason that the Respondent has filed several requests to supplement the record. The request to the Clerk of the Supreme Court of Florida places before this Court all of the briefs filed in the Florida Supreme Court. Although briefs are not normally regarded as part of the record below to be certified, a special circumstance exists in the instant case to bring these before this Court. See *Stearn and Gressman, Supreme Court Practice,* 4th Edition, page 271. With the briefs before this Court as part of the record, it is obvious that although the applicability of the *Hoffman* v. *Jones* decision to the case sub judice was briefed and argued below, the Petitioner, at no time, prior to the rendition of the Florida Supreme Court's opinion attempted to assert a federal question. (Indeed,

the applicability of *Hoffman* v. *Jones* to the instant case was briefed when *Hoffman* v. *Jones* was still pending before the Florida Supreme Court since the Fourth District Court of Appeal had originally adopted "comparative negligence" in the case of *Jones* v. *Hoffman*, supra, and certified the question to the Florida Supreme Court.) Despite the briefing in the Florida Supreme Court relative to *Hoffman* v. *Jones*' applicability to the instant case, the Petitioner never asserted that applying that decision to the instant case would deprive it of a federally guaranteed right. Even after an adverse decision by the Florida Supreme Court, the only reference by the Petitioner to any federal question is found in a brief conclusionary remark in Paragraph 4 of its petition for rehearing asserting that the decision "does violence to the due process clause of the Fourteenth Amendment of the United States Constitution. . . ." (PET-42a) No explanation or further briefing is given to this conclusionary statement.

Even if the Petitioner had properly raised and argued a federal question in its petition for rehearing, such is not the proper time to preserve its claim for review in this Court "(I)f you are about to commence litigation (in a State Court) in which there may be involved, then or ultimately, a question arising under the constitutional laws of the United States, you must raise the federal question at the outset and not as an afterthought after you have lost below. By that time you are almost always too late . . . unless you build the record in your state litigation so that you *do* make a federal case out of it, you not only do not have a rosy chance of review, you don't have any chance at all." Wiener, *Wanna Make a Federal Case Out Of It?* 48 A.B.A.J. 59, 60, 62 (1962).

A party cannot consciously delay raising a federal question in the state proceedings. Doing so amounts to a waiver of the federal question. *Henry* v. *State of Missis-*

sippi, 379 U.S. 443 (1965), reh. den. 380 U.S. 926 (1965). Timely insistence upon the federal grounds relied upon for jurisdiction in this Court must be made at the state Court level. Where no federal constitutional question is raised below, the question cannot be raised for the first time in this Court. *Charleston Federal Savings and Loan Asso.* v. *Alderson*, 324 U.S. 182 (1945); *Raley* v. *State of Ohio*, 360 U.S. 423 (1959); *Slagle* v. *State of Ohio*, 366 U.S. 259 (1961).

In *Hanson* v. *Denckla*, 357 U.S. 235, 244 (1958), this Court held it was without jurisdiction to consider an appeal from the Florida Supreme Court since the federal ground relied upon for jurisdiction (the unconstitutionality of Florida's Constructive Service Statute) was not raised until petition for rehearing in the Florida Supreme Court. This was so held despite the fact that the defendant did assert a general conclusionary motion to dismiss in the Trial Court but failed to brief or further argue any federal question until petition for rehearing in the Florida Supreme Court.

In *Hill* v. *California*, 401 U.S. 797, 805 (1970) a criminal defendant attempted to raise for the first time before this Court the question of a deprivation of his Fifth Amendment rights by the introduction of pages of his diary in evidence against him. Since the question "had never been raised, preserved, or passed upon in the state court", this Court relied upon *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969) and "a long line of cases" and held it was without jurisdiction to reach the issue. See also *Monks* v. *New Jersey*, 398 U.S. 71 (1970).

The Petitioner asserts at page 6 of its Petition that: "The question of violation of federally guaranteed rights of Seaboard was raised immediately upon realization that the Supreme Court had done violence to them." Such is not the case as is established by the supplemental record be-

fore this Court. The Petitioner well knew the Respondent was arguing for the precedent of *Hoffman* v. *Jones* to be applied in the instant case and for the reinstatement of the original jury verdict if and when the Florida Supreme Court determined that "comparative negligence" was to be applied uniformly in all negligence litigation. Supplemental briefs were filed when *Hoffman* v. *Jones* was still pending before the Florida Supreme Court. Yet, the federal constitutional question asserted before this Court was never raised in the Supreme Court of Florida. In fact, the two points relied upon by the Petitioner in this Court are founded upon an equal protection argument, and, as previously mentioned, the only provision of the United States Constitution even briefly mentioned in the Supreme Court of Florida was the "due process clause" at Paragraph 4 of the petition for rehearing. (PET-42a)

Under such circumstances, this Court must find that it is without jurisdiction and deny the Petition for Certiorari.

II

Should Certiorari Be Granted Where It Appears That the Decision of the Supreme Court of Florida Was Based upon Adequate Non-Federal Grounds?

In an unbroken line of decisions, this Court has held that when a state Court, in entering the order attacked in this Court, does so on a non-federal ground, this Court has held it is without jurisdiction to review such order. *Newman* v. *Gates*, 204 U.S. 89 (1907); *John* v. *Paullin*, 231 U.S. 583 (1913); *Atlantic Coastline Railroad* v. *Mims*, 242 U.S. 532 (1916); *Central Union Telephone Co.* v. *City of Edwardsville*, 269 U.S. 190 (1925); *McMaster* v. *Gould*, 276 U.S. 284 (1927); *Wolfe* v. *State of North Carolina*, 264 U.S. 177 (1960). This principle is axiomatic and is concisely summarized in *Henry* v. *Mississippi*, supra, wherein this Court stated:

> "It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions. The principle applies not only in cases involving state substantive grounds, Murdock v. City of Memphis, 2 Wall 590, 22 Law Ed. 429, but also in cases involving state procedural grounds. . . Under the view taken in Murdock of the statutes conferring appellate jurisdiction on this Court, we have no power to revise judgments on questions of state law. Thus, the adequate non-federal ground doctrine is necessary to avoid advisory opinions."

Furthermore, where, as in the instant case, the highest state Court failed to mention in its opinion or give any discussion to a federal question, this Court will assume that such omission was due to the fact that the question was not presented in the state Court. This presumption must stand unless the Petitioner can affirmatively show that the question was raised and properly briefed. *Bailey* v. *Anderson,* 326 U.S. 203 (1945); *I. and L. R. Co.* v. *McGuire,* 196 U.S. 128, 131-133 (1905); *Street* v. *New York,* 394 U.S. 576, 582 (1969).

The opinion of the Florida Supreme Court (PET-1a-6a) not only demonstrates that it is based upon the state law of "comparative negligence" and the precedent of *Hoffman* v. *Jones,* but, more importantly, demonstrates that no federal issue was ever placed before it for consideration. The decision to apply *Hoffman* v. *Jones* to the instant litigation is based upon the non-federal grounds that the case was previously tried under an identical "comparative negligence" doctrine and, therefore, a new trial (under the precedent of *Hoffman* v. *Jones*) would serve no useful purpose. The decision in *Hoffman* v. *Jones* to adopt

"comparative negligence" for Florida is purely state oriented and the applicability of *Hoffman* to the instant case is based on the non-federal grounds that the Respondent had "appropriately and properly raised" the doctrine of "comparative negligence" before the *Hoffman* opinion was rendered. The decision, both substantively and procedurally, is based upon non-federal grounds and is not subject to review by this Court.

III

Do the Facts in This Case Present Questions of Sufficient Public Importance to Invoke the Discretionary Power of This Court to Grant Certiorari?

Interestingly, the Respondent previously petitioned this Court for a writ of certiorari after the Florida Supreme Court retroactively applied its decision in *Georgia Southern and Florida Railway Co.* v. *Seven-Up Bottling Co. of Southeast Georgia, Inc.*, supra, and reversed and remanded this case for a new trial. In its brief in opposition, the Petitioner (at that time, Respondent) argued vehemently that the Florida Supreme Court's decision "affects only a small number of people in Florida who incur injuries by driving upon the railroad tracks when trains are coming, or who strike trains on the tracks." Respondent's brief in opposition, Case No. 855, October Term, 1967, page 12. The instant case involves an even more minute section of the nation's population—that portion of Florida citizenry who happened to have previously tried a case under Florida's now defunct railroad negligence statute (F.S. Section 768.06, F.S.A. 1959), who received a judgment which was voided by retroactive application of the *Seven-Up* decision, and who were still in the Appellate Courts of Florida at the time of the *Hoffman* v. *Jones* decision. It is respectfully submitted that there is not another person in all of Florida to whom the Florida Supreme Court opinion in the

instant case would apply. Under such circumstances, the opinion cannot be said to be of such significance as to warrant this Court's time.

IV

Point I of Petitioner

Whether It Is a Violation of Seaboard's Right of Due Process and Equal Protection of the Law As Guaranteed by the Constitution of the United States for the Supreme Court to Reinstate a Judgment That It Had Previously Reversed Because It Was Based on a State Statute That It Had Declared to Be Unconstitutional?

Point II of Petitioner

Whether It Is a Violation of Seaboard's Right to Due Process and Equal Protection of the Law As Guaranteed by the United States Constitution for the Supreme Court of Florida to Give Retrospective Application to a Recent Decision Revitalizing a State Statute Which It Had Previously Held to Be Invalid and Which Was Not in Effect at the Time the Case Was Tried, Appeal Completed and Petition for Certiorari Filed?

combined and restated by the Respondent:

In Holding Hoffman v. Jones to Be Applicable to the Instant Case Did the Florida Supreme Court Violate the Petitioner's Constitutional Rights?

The gist of Petitioner's argument under Points I and II of its Petition is that even though the case might properly be remanded for new trial since Florida has now adopted "comparative negligence", a reinstatement of the original final judgment was improper. At page 12 the Petition asserts:

"The only way that Seaboard can be protected in its constitutional rights is for the case to be re-tried under proper instructions based on the decision of *Hoffman* v. *Jones.*"

At page 11 of the Petition it is argued that the "comparative negligence" doctrine announced in *Hoffman* v. *Jones* sets forth a different procedure of trying cases than the procedure utilized in the original trial under the defunct railroad crossing statute. The Petitioner asserts that *Hoffman* v. *Jones* requires special interrogatories to the jury whereby the jury relates to the Court its findings relative to the percentage of negligence and the total amount of damages. *Hoffman* v. *Jones* requires no such procedure as the Florida Supreme Court undoubtedly realized in ordering the original final judgment reinstated. Indeed, the undersigned counsel has tried several cases under the doctrine announced in *Hoffman* and never have the juries been requested to answer special interrogatories. A jury simply must, in its own mind, apportion the damages in exactly the same manner as the jury did in the original trial. At any rate, the procedure called for in *Hoffman* v. *Jones* is distinctly a matter of state law and the Florida Supreme Court has rendered its decision in that regard.

The argument at pages 10 and 11 of the Petition that *Hoffman* v. *Jones* violated the doctrine of separation of powers is of such a nature it requires little comment. Suffice it to say that neither "contributory negligence" nor "comparative negligence" are matters of statutory law. Rather, they are both judicially created doctrines which, in view of changing circumstances and modern times, may be modified by Court decision.

The Petitioner, at page 10 of the Petition, relies upon *Gibbs* v. *Zimmerman,* 290 U.S. 326 (1933) for the proposition that it somehow had a "vested right" in the doctrine

of "contributory negligence". *Gibbs* hardly stands for such a proposition. Where, as here, the substantive state law has undergone a change as a result of a recent judicial decision while a case is still pending and where at the time of the decision the Court sets forth rationally the class of cases to which the recent decision will apply, a litigant cannot reasonably argue a denial of due process or equal protection because his case falls within the class of cases affected by the change in the law. There is no "vested right" in the continuance of an outmoded and unjust doctrine. Indeed, if it were in fact the law that a recent judicial decision in one case cannot change the "law of the case" in another pending case, did not the respondent have a "vested right" in "comparative negligence" under the *Loftin* v. *Crawley's, Inc.* decision, 8 So.2d 909 (Fla. 1942) which originally had held F.S. Section 768.06, F.S.A. 1959 constitutional?

In *Demorest* v. *City Bank Farmers T. Co.*, 321 U.S. 36, 48, 49 (1944) cited at page 10 of the Petition, this Court was confronted with a legislative enactment which changed the law and affected the litigants. Pointing out that the new statute did not operate retroactively but only affected cases "pending at or instituted after its enactment", this Court found no constitutional infringement by the New York Legislature. The Florida Supreme Court in *Hoffman* v. *Jones* stated that the decision would only apply to cases pending in the Appellate Courts in which the doctrine of "comparative negligence" had been "appropriately and properly raised during some stage of the litigation". (PET-5a) In the instant case, the "comparative negligence" doctrine had been the doctrine under which the original trial had proceeded. The Florida Supreme Court therefore simply reinstated the original jury verdict. This was not, as the Petitioner argues at page 8 of the Petition, because the Florida Supreme Court chose "to revitalize the dead

statute", but because "comparative negligence" is now the law of Florida and the case had already properly been tried under that doctrine.

V

CONCLUSION

For the above-stated reasons, it is respectfully submitted that the Petition does not present any questions warranting review by this Court and should be denied.

Respectfully submitted,

JOS. D. FARISH, JR.
Of Counsel

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Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari has been furnished Madison F. Pacetti, Esq., Caldwell, Pacetti, Barrow & Salisbury, 324 Royal Palm Way, Palm Beach, Florida 33480, Attorneys for Petitioner, by mail, this the 29th day of January, 1974.

JOS. D. FARISH, JR.
Attorney

of "contributory negligence". *Gibbs* hardly stands for such a proposition. Where, as here, the substantive state law has undergone a change as a result of a recent judicial decision while a case is still pending and where at the time of the decision the Court sets forth rationally the class of cases to which the recent decision will apply, a litigant cannot reasonably argue a denial of due process or equal protection because his case falls within the class of cases affected by the change in the law. There is no "vested right" in the continuance of an outmoded and unjust doctrine. Indeed, if it were in fact the law that a recent judicial decision in one case cannot change the "law of the case" in another pending case, did not the respondent have a "vested right" in "comparative negligence" under the *Loftin* v. *Crawley's, Inc.* decision, 8 So.2d 909 (Fla. 1942) which originally had held F.S. Section 768.06, F.S.A. 1959 constitutional?

In *Demorest* v. *City Bank Farmers T. Co.*, 321 U.S. 36, 48, 49 (1944) cited at page 10 of the Petition, this Court was confronted with a legislative enactment which changed the law and affected the litigants. Pointing out that the new statute did not operate retroactively but only affected cases "pending at or instituted after its enactment", this Court found no constitutional infringement by the New York Legislature. The Florida Supreme Court in *Hoffman* v. *Jones* stated that the decision would only apply to cases pending in the Appellate Courts in which the doctrine of "comparative negligence" had been "appropriately and properly raised during some stage of the litigation". (PET-5a) In the instant case, the "comparative negligence" doctrine had been the doctrine under which the original trial had proceeded. The Florida Supreme Court therefore simply reinstated the original jury verdict. This was not, as the Petitioner argues at page 8 of the Petition, because the Florida Supreme Court chose "to revitalize the dead

statute", but because "comparative negligence" is now the law of Florida and the case had already properly been tried under that doctrine.

V

CONCLUSION

For the above-stated reasons, it is respectfully submitted that the Petition does not present any questions warranting review by this Court and should be denied.

Respectfully submitted,

Jos. D. Farish, Jr.
Of Counsel

Farish & Farish
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West Palm Beach, Florida
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari has been furnished Madison F. Pacetti, Esq., Caldwell, Pacetti, Barrow & Salisbury, 324 Royal Palm Way, Palm Beach, Florida 33480, Attorneys for Petitioner, by mail, this the 29th day of January, 1974.

Jos. D. Farish, Jr.
Attorney